Federal Trade Commission

"The Federal Trade Commission's Agenda for the 90's"

Prepared Remarks of

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

I am pleased to be here today in the company of such a diverse population of recognized promotion professionals. While preparing my remarks, I tried to think of a way to promote the work of the Federal Trade Commission, by learning from some of your own methods. I thought that maybe a baseball cap, or a T-shirt, inscribed with the words "truth and fairness," would grab everyone's attention. Although these are laudable concepts, I hold no illusions that they could really compete against the likes of the Teenage Mutant Ninja Turtles or the tried and true, Ronald McDonald. Next, I thought perhaps some of you might be interested in a coupon good for one free meeting with a Commissioner. But, of course, these meetings are already free and, from your client's perspective, hopefully to be avoided. So, I guess I will just have to go back to the drawing board.

I am sure that many of you are constantly looking for creative new ways to promote your products. And I know that the lawyers among you are always keeping your eyes open for the legal "time-bombs" within promotions that could cause problems -- either through private litigation or through law enforcement actions. Since I am one of the law enforcers you worry about, my topic today may not be one of the most favorite subjects among promotion professionals. I will speak generally about the FTC's agenda for the 90s, but part of my talk could be aptly subtitled: How NOT to Promote Your Products. And my first bit of advice will be by way of example -- always remember to make your disclaimers. Mine for today is that the views I express are my

own. They do not necessarily reflect those of the Commission, or of any other Commissioner.

In my remarks today, I will discuss some of the Commission's activities within both its consumer protection and antitrust missions. Let me begin with consumer protection. I will first review some of our cases and activities that have concerned incentive promotions, then discuss a few of the "hot topics" in the area of national advertising.

Fraudulent Promotions

In most cases, promotional incentives, such as games and free-prize offers, provide consumers with entertainment, savings, or both. Unfortunately, in the wrong hands, promotional incentives can also be used as a "come-on" for underlying fraud. Governing statutes, and regulations such as the Commission's Games of Chance Rule, seem to have assisted in maintaining fair play in legitimate game promotions. As a result, most of the Commission's recent law enforcement actions in this area have been aimed at promoters who simply do not provide the promised goods.

In the last several years, the Commission has filed quite a number of court actions against companies that deceptively proclaimed, "YOU HAVE WON!" For example, this past August, the

Commission sued a Florida company for mailing postcards to consumers telling them that they had won valuable awards, such as $5,000 in retail merchandise checks, vacation packages, or diamond earrings. In fact, the Commission has alleged that consumers actually won nothing of substantial value and, moreover, had to pay additional sums of money to obtain the so-called "prize."[1]

In June, the Commission filed suit against another Florida company named Promotion Specialists, Inc.[2] This company provided services to various telemarketers, including the preparation and mailing of postcards and letters to consumers, announcing that they had won a valuable award. The Commission charged that the company knew, or should have known, that recipients of the postcards had not been selected to receive an award, and that consumers had to purchase merchandise to receive the award. In this case, the Commission also alleged that Promotion Specialists knew or should have known that only the least expensive of the awards listed would ever be available to consumers.

The Commission's complaint against Promotion Specialists sets important precedent, because it charged the company with providing to telemarketers the "means and instrumentalities" used

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[1] FTC v. Ion Technology Systems, Inc., No. 90-6660 (S.D. Fla. filed Aug. 15, 1990).

[2] FTC v. Promotion Specialists, Inc., No. 90-479-CIV-ORL-19 (M.D. Fla. filed June 26, 1990).

to commit unfair and deceptive practices. In addition to mailing the initial correspondence, the company also supplied and shipped to consumers the "awards" and merchandise; facilitated the processing of credit card charges; and received and processed returns of merchandise and consumer complaints. The Commission's complaint alleged that the defendants provided these services with the knowledge that the telemarketers were engaged in misrepresentations, and that the defendants knowingly and substantially assisted those telemarketers.

This case reflects the commitment of the Commission's staff in the Bureau of Consumer Protection to seek out and recommend appropriate enforcement action against those companies who knowingly assist the frauds of others through the provision of services that facilitate fraud. I want to commend our Bureau Director, Barry Cutler, and Deputy Director Gloria Larson, for the leadership they have provided in seeking out those operators who may form the hub of an organized system of fraudulent schemes. Obviously, however, "means and instrumentalities" is an area where the Commission must tread very carefully, to ensure that we are not stifling legitimate activity.

Some bogus prize offerings have occurred in connection with timeshare solicitations. Maybe some of you have been the lucky recipients of a postcard like the one we saw in a recent action, which stated: "Final Notice -- our previous letters to you have

not been answered. If you do not respond within 72 hours, you will forfeit your opportunity to claim the 1990 BMW." In fact, consumers who responded to these solicitations received redemption certificates that, together with a payment of $50 to $60, entitled the consumer to merchandise that could be purchased at discount stores for approximately the same price. In a consent order resolving this case, and in several other consent orders, the Commission has prohibited misrepresentations of prizes to be awarded, and required that any costs associated with receiving the prize be disclosed.

I do not expect that the companies represented here would have engaged in the type of outright misrepresentations that characterize the cases I have just mentioned. However, these cases do illustrate two points that are useful to remember in any prize or award promotion. First, be sure you disclose clearly in your promotion any limitations or conditions on the receipt of the award you offer. Second, be careful that you do not imply that consumers have actually won a prize, if they may not have won in fact. Among this sophisticated audience, such pointers may be considered elementary lessons of Promotion Law 101, but since many of the Commission's cases, including those against legitimate businesses, have concerned failures to disclose material facts, I do not hesitate to stress the importance of making adequate disclosures.

In addition, I think it important that your organization be aware of the kinds of fraudulent practices that are used in the promotion context. Such practices not only cause direct harm to the consumers who are actually deceived, but they also cause indirect harm to those of you who use legitimate promotions, because they foster distrust among the consumers you hope to attract. Education is the key here, as our Chairman, Janet Steiger, has stressed in a variety of fraud contexts. We have been trying to get the word out, for example through our consumer brochures, and I noticed last week that the popular and widely-read columnist, Ann Landers, also sent a warning to her readers. Similar efforts by the business community would clearly be most welcome.

Smokeless Tobacco Warning Labels on Utilitarian Items

Perhaps one of consumers' favorite incentives comes from specialty advertising -- utilitarian items, like clothing or coffee mugs, inscribed with a logo or slogan that can help establish name recognition and maintain brand loyalty. As you may know, the Commission is currently in the process of developing rules that will govern the placement of warnings on utilitarian items bearing brand-name logos or selling messages for smokeless tobacco products. In 1986, Congress passed the

Comprehensive Smokeless Tobacco Act,[3] which required the Commission to promulgate rules implementing the Act's requirements that all advertising for smokeless tobacco products display one of three warning labels.

Although the Commission had originally exempted utilitarian items from the rules it promulgated, this exemption was overruled first by a federal district court,[4] and then by the court of appeals.[5] So, the Commission went back to Square One, issued requests for public comments, and the staff has been struggling ever since with the difficult task of developing workable regulations for posting warnings on items that may not readily lend themselves to so many words. The Commission will begin its review of the staff's recommendations shortly, and we are hopeful that final regulations will be issued either by the end of this year, or early next year.

900 Numbers and Infomercials

Now let's turn from incentive promotions to two growing and popular avenues, or formats, for promotion. One of these is a burgeoning telecommunications technique that offers exciting marketing possibilities, but which is also creating new

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[3] 15 U.S.C. §§ 4401-4408.

[4] Public Citizen v. FTC, 688 F.Supp. 667 (D.D.C. 1988).

[5] Public Citizen v. FTC, 869 F.2d 1541 (D.C. Cir. 1989).

challenges for the Commission and other law enforcement agencies -- that is the "900" number, and its local counterpart, the "976" number. The Washington Post recently reported that in the first six months of this year, the number of national "900" numbers grew 84% -- from roughly 3,000 in January, to 5,500 in July.[6] This is obviously a popular mechanism for many legitimate businesses, and consumers clearly are enjoying many of the opportunities provided. Unfortunately, some 900 and 976 lines have also provided a new avenue for consumer fraud.

The Commission recently brought two cases that are pending in federal court against companies that have used 900 number audiotext promotions, and the staff is continuing to investigate other potential violations in this area. In one recent case, the Commission charged that the defendant company offered credit cards to consumers with no credit histories, or poor ones, and implied that the cards would be accepted wherever Mastercard or VISA are accepted.[7] In fact, our complaint alleged that consumers who dialed the 900 number, and were billed $39 for their calls, received a credit card that could only be used to purchase merchandise from the defendants' catalogue.

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[6] The Washington Post, October 17, 1990, page F-1.

[7] FTC v. Timmerman, No. HAR-90-2007 (D.Md. filed July 25, 1990).

In the second case, the defendants ran classified advertisements for jobs in newspapers all over the country. The Commission alleged that the ads did not disclose that callers would be charged $18 to $25 for the call.[8] In addition, the sound quality of the recorded message was so poor that many consumers called the 900 number repeatedly, incurring substantially greater costs; one consumer called as many as ten times. Finally, the Commission charged, no jobs were actually available, and the defendants failed to provide any promised services.

The Commission is working closely with the Federal Communications Commission, state law enforcement officials, and the telephone companies to seek solutions to problems that have arisen with 900 and 976 numbers. If you utilize caller-paid telephone numbers in your promotions, you should make sure to disclose clearly the cost of the call in your advertisements. In addition, you may also want to consider other voluntary measures to avoid undue inconvenience and hardship for consumers, to preserve their good feelings toward this promising marketing tool, particularly where the ads are directed toward children.

Another relatively recent marketing technique is the "infomercial" -- a program-length television commercial that is

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[8] FTC v. Transworld Courier Services, Inc., No. 1:90-CV-1635-JOF (N.D. Ga. filed July 25, 1990).

often framed as an investigative program or talk show devoted to a particular product. In the last 20 months, the Commission has brought seven law enforcement actions against infomercial advertisers and producers. In each case, the Commission charged that the claims made for the advertised product were deceptive. In most of the cases, the Commission also charged that the company had misled consumers by misrepresenting the nature of the program. Consent agreements in these cases have prohibited false and unsubstantiated product claims, and have required that the commercial nature of the program be disclosed at certain intervals.

One of the Commission's most recent and significant cases in this area concerned programs made by Twin Star Productions, one of the largest producers of infomercials in the industry. In that case, the Commission alleged that three of Twin Star's productions contained deceptive claims. One infomercial promoted a baldness cure; another advertised a purported cure for impotency; and the third sold a skin patch that was claimed to promote weight loss. The Commission's order against Twin Star requires that such future claims be substantiated, and required the company to pay $1.5 million in consumer redress.

Deceptive infomercials have been the subject not only of state and federal law enforcement actions, but also of Congressional inquiry and some general negative publicity. As a

result, some of the more egregious examples of deceptive formats, such as those misrepresenting that they are objective consumer news or investigative reporting shows, appear to be diminishing. Still, the Commission staff continues to closely monitor infomercials, and to fully investigate any product claims they suspect to be false or unsubstantiated.

I want to stress, however, that the concern over infomercials is certainly not whether it is appropriate to have program-length commercials. Rather, our concern is with deceptive and misleading claims. The infomercial industry also seems to have recognized the importance of ensuring the integrity of claims made in this medium; it is my understanding that their association is drafting guidelines to respond to ethical concerns about certain aspects of their advertising.

Environmental and Health Claims

The issues arising in the context of 900 numbers and infomercials have presented the Commission with familiar consumer fraud problems in new packaging -- in other words, the proverbial "snake-oil salesman" has moved from the back of the wagon to the airwaves, and new technology is used to perpetrate an old fraud. Other recent issues, however, have arisen from new advertising claims in more traditional media prompted by current consumer concerns -- namely, physical health and the environment.

As consumers have become more concerned with protecting the environment, companies have tried to develop products that respond to this interest. Consequently, a number of products now carry claims like "biodegradable," "ozone-safe," "environmentally-friendly," and "recyclable." Environmental advertising presents a challenge for the Commission. On the one hand, we certainly do not want to chill truthful claims in this area, because the ability to truthfully advertise the environmental advantages of a product not only benefits consumers interested in those products, but it also encourages the continued development of products that can benefit the environment. On the other hand, environmental claims are the type that the Commission traditionally scrutinizes most closely because consumers cannot so easily evaluate for themselves the truthfulness of the claims. The consumer, for example, cannot determine whether a plastic garbage bag does in fact degrade in the local landfill (or when), or whether a product has no effect on the earth's ozone layer. The Commission staff is currently involved in several investigations in this area, as are several of the state attorneys general. While this area presents difficult issues of substantiation, as with any type of advertising claim, the Commission can best protect the integrity of all advertising by challenging those which it finds to be deceptive under our traditional deception standards.

Health claims for foods have also been on the increase. Advertising that promotes the health benefits of specific food products offers another excellent example of how the Commission must carefully balance the benefits of truthful information, against the harmful effects of deceptive claims. In 1989, a landmark study by the Commission's Bureau of Economics showed that advertising and labeling claims for ready-to-eat cereals increased consumer awareness of the potential nutritional benefits of fiber in the diet.[9] By providing empirical support for the positive effects of truthful advertising, this study underscored the need for the Commission to proceed with caution in challenging health claims that may provide truthful information. However, one of the Commission's highest priorities is to challenge health claims for foods that are truly false or unsubstantiated.

The Commission staff has investigated a number of cases in the last few years involving health claims for foods. One recent case, a matter still under consideration by the Commission, concerns advertisements for Mazola corn oils and margarines. The makers of Mazola, CPC International, ran a series of advertisements that claimed that the use of Mazola products could help reduce a person's serum cholesterol. One ad contrasted a

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[9] Ippolito, P. and Mathios, A., Health Claims in Advertising and Labeling: A Study of the Cereal Market, Bureau of Economics Staff Report, Federal Trade Commission, August 1989.

picture of a raw chicken leg, with another fried in Mazola oil. A second ad depicted a grandfather who proclaimed in the headline that he had lowered his cholesterol level by 17% after switching to Mazola, while the text of the ad explained that he had also been exercising and following a low-fat diet.

Earlier this year, the Commission, by a 4 to 1 vote, approved a consent agreement settling charges that these advertisements were deceptive, and placed it on the public record for comment. The Commission is currently reviewing the public comments to determine whether it will issue the complaint and consent order in final, or whether it will withdraw its consent and take such other action as it deems appropriate.

Although I voted to issue the agreement for public comment, the Mazola matter represented to me the classic dilemma between prohibiting deceptive claims and trying not to chill truthful ones. Let me explain. Scientific studies have for many years tended to show that polyunsaturated fats, which are contained in corn oils, may have a cholesterol-reducing effect. Faced with evidence that some interpretations of the Mazola ads could be substantiated, while others could not be, the issue for the Commission was whether reasonable consumers would be likely to interpret the ads as making the unsubstantiated claims, as alleged in the complaint. Former Commissioner Calvani voted against the issuance of the agreement because he felt that the

evidence did not show that reasonable consumers would be likely to infer the unsubstantiated claims.

The Commission has received public comments from a variety of distinguished and reputable sources. Some commentators -- including the Food and Drug Administration and the attorneys general from 10 states -- have praised the consent agreement. Others -- including scientific researchers from Harvard, Stanford, and other universities -- expressed concerns that the agreement might chill the dissemination of some truthful information about the relationship of polyunsaturated fats to cholesterol.

Whatever the Commission's final decision, it will be important that its action be carefully interpreted. One of my concerns in this, and in other cases, is that the Commission try to give appropriate guidance to the consumer and business communities about the import of its decisions. When consent agreements are at stake, and thus, no written Commission opinion is rendered, Commission action can often appear cryptic.

I have given you an overview of some of the Commission's recent consumer protection activities. Now let me discuss two antitrust matters in which you may be interested.

Fred Meyer Guides

As I am sure you are aware, the "Guides for Advertising Allowances and Merchandising Payments and Services" are alive and well in Washington, D.C. This past summer, the Commission ended a multi-year odyssey and, for the first time since 1972, revised the Guides commonly known as the "Fred Meyer Guides."

In supporting the revised Guides, two concerns motivated me: first, keeping the Guides current with the Robinson-Patman case law; and second, maintaining the Guides as a useful, understandable aid to cooperative advertising and sales promotion. I must admit that before I joined the Commission, my law practice had not touched much on issues discussed in the Fred Meyer Guides. Consequently, when the revisions were brought to my attention, soon after I took office, I found it necessary to review some of the history and lore surrounding the Guides.

What I came to appreciate was the value many in the business community place on the Guides, not as arbitrary rules imposed by the Federal Trade Commission, but as useful standards by which businesses may orient cooperative advertising and promotion to avoid Robinson-Patman violations. In fact, the Guides are not "rules." They do not have the force of law. Rather, they are advisory interpretations of Sections 2(d) and 2(e) of the Robinson-Patman Act. One of my goals during the revisions was to

maintain the practical value of the Guides to business, a goal that I hope we achieved. In the context of keeping them useful, I would like to share with you some thoughts about one of the revisions.

Perhaps the central concept of Sections 2(d) and 2(e) is proportional equality. In the simplest terms, when a seller of goods makes promotional and advertising support available to one customer to facilitate the resale of its products, that seller must make proportionally equal offers available to other customers who compete in the resale of its products. The purpose behind Sections 2(d) and 2(e) is to prevent the use of marketing allowances as disguised discounts in violation of the prohibition against price discrimination. In other words, Sections 2(d) and 2(e) prevent a manufacturer from offering a favored customer a discount as a marketing allowance, without making an analogous offer to competing customers.

As those who followed the revisions know, the definition of proportional equality was controversial. Most of the comments we received on the draft revisions dealt with this issue. Some expressed concern that one traditional method of determining proportional equality, the case allowance, might not be consistent with the then-existing Guides. Most comments on this issue expressed strong support for the case allowance as an acceptable method of maintaining proportional equality. They

urged that the case allowance has many obvious advantages in assuring fair and equivalent treatment to all customers; it is easy to administer, and to determine when a seller discriminates and varies from it. The commentators argued that it carries with it a sense of fairness, in that marketing assistance is available to all customers on a basis that could be objectively determined. Accordingly, it was important that the revisions maintain the use of the case allowance as a measure of proportional equality, and this is done as part of the seller's cost approach.

The controversial alternative was the suggestion that the Commission adopt a "seller's value" standard of proportional equality. This approach recognizes that promotion activities may vary in effectiveness. A dollar spent on television advertising may produce different results than a dollar spent on radio, handbills, or in store displays. Under a seller's value standard, the seller can weigh the productivity or value to itself of the particular activity in meeting the requirement of proportional equality. If, to a particular seller, television is twice as effective as newspapers in building sales, that seller may offer twice as much marketing support to customers that use television, as to customers that use newspapers. Although proponents of the seller's value approach to proportional equality cite certain advantages in the way of economic efficiencies, as an approach to be adopted in the Guides, seller's value had drawbacks.

One primary goal of the Guides is that they be self-policing -- that is, both customers and sellers should be readily able to tell whether a seller is complying with Sections 2(d) and 2(e) of Robinson-Patman. This minimizes disputes and litigation. A seller's value standard would make it difficult for a customer to observe whether a seller was violating Section 2(d) or 2(e). If a seller wanted to discriminate against a group of customers, it could simply argue that the value of the promotion activities undertaken by the favored customers was greater than the value of the promotion activities undertaken by less favored customers. The self-policing nature of the Guides would be undermined, because customers would have no objective criteria with which to determine whether a seller was violating Sections 2(d) or 2(e).

The Commission declined to adopt the seller's value standard in the Guides, which, given the nature of the Guides, I believe is the correct decision. Some comments received by the Commission on the draft revisions expressed the view that certain case law sanctioned at least some use of the seller's value standard. To the extent that any case law does sanction a seller's value standard, the Guides, by not adopting that standard, do not revoke that case law. I view the Guides as providing "safe harbor" guidance, allowing businesses to avoid not only actual violations of Robinson-Patman, but also disputes and litigation over whether there is a violation. To the extent

that certain case law suggests that the use of a seller's value standard might be an acceptable way to determine proportional equality, those willing to live on the "cutting edge" of the law are free to accept the risk and use that standard. However, I think it appropriate that the Commission structure its advisory interpretation to provide a level of comfort that helps minimize the cost of complying with the law. I believe the approach used by the Commission has helped achieve that objective.

In its 1989 report, a Special Committee of the American Bar Association's Section of Antitrust Law made a number of suggestions for improving the Federal Trade Commission,[10] including the suggestion that the Commission should work "aggressively" to provide guidance to the public. Among other things, the Committee recommended that the Commission regularly review its various guides to ensure that they reflect current policy.[11] The Commission's revisions to the Fred Meyer Guides are an example of how the Commission has actively responded to these constructive suggestions.

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[10] Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission (1989).

[11] Id. at 63.

Slotting Allowances

A final area that I want to mention, because it is one that frequently generates questions, is slotting allowances. Slotting allowances are usually one-time fees that food manufacturers pay to food retailers to introduce a new product. There are conflicting industry opinions on the effect of slotting allowances. Some argue that they are anticompetitive because they impede the entry of companies that cannot afford to pay them. Others suggest that slotting allowances reflect healthy competition among manufacturers and distributors. In their view, such allowances represent a cost to these firms similar to other costs arising from the introduction of new products, such as introductory allowances, advertising, in-store promotions and off-invoice discounts. Slotting allowances also may, in part, represent a payment to retailers to cover their cost of introducing a product, or their opportunity cost of providing shelf space to one of a competing group of new products. In fact, some have argued that they are one of the most effective ways to introduce new products because they may permit manufacturers to get their products to consumers quickly, and with substantially fewer resources.

To date, the Commission has not challenged any slotting allowance practices. Whether the Commission would challenge the use of slotting allowances depends on the market circumstances at

issue, and, of course, would be analyzed on a case-by-case basis. A number of legal theories applicable to the use of slotting allowances have been advanced for our consideration. I will briefly discuss the primary ones. First, a horizontal agreement among competing retailers or manufacturers to fix the price or other aspects of shelf space allocation across competitors might constitute a violation. Second, if there is a dangerous probability that a single manufacturer could successfully monopolize a relevant product and geographic market through the purchase or control of shelf-space, it is argued that might be possible to establish a violation. Third, a law violation might exist if there is a dangerous probability that a single retailer could successfully monopolize a relevant product and geographic market through the inducement or receipt of slotting allowances. Fourth, it is argued that the payment of different slotting allowances to competing retailers may constitute a violation of the Robinson-Patman Act insofar as there may be discriminatory pricing. Again, in analyzing the legality of slotting allowances, we look at the overall market conditions and the reasons for their use.

In concluding, now that I've offered some advice about how not to promote your products, let me give you a summary of how I view the FTC's agenda for the 90's. The Commission is pursuing a very active law enforcement mission in a variety of contexts, and concerning many aspects of business. I have been impressed,

during my first year at the Commission, with the conscientious and hard-working nature of the Commission staff. Through their investigations and monitoring of questionable business practices, I am secure in the knowledge that our competitive society is protected against the unfair and deceptive practices of the unscrupulous. I like to characterize the FTC of the 90's as pursuing a vigorous law enforcement agenda, tempered by an understanding of the constraints that overregulation can impose on legitimate industry. I hope that this is also your view of us.