Federal Trade Commission

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REMARKS OF JANET D. STEIGER

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BEFORE THE AMERICAN ADVERTISING FEDERATION

GOVERNMENT RELATIONS CONFERENCE

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The views expressed in these remarks are those of Chairman Steiger. They do not necessarily represent the views of the Commission, or of any other Commissioner.

It is a pleasure to meet with you for the second time as chairman of the Federal Trade Commission, to wonder at how quickly a year has passed, and to take note of some of the significant developments affecting advertising law that we have seen at the FTC since my last report to you. Last year I said that this conference might be getting known, unofficially at least, as the State of the Union of Advertising. If that is a fair designation, I can report that the state of advertising law and enforcement at the FTC is very good.

Last year I spoke to you of an FTC that shared your industry's recognition of the importance of advertising to our economy, but also recognized the agency's need to secure the public's confidence in the FTC as a vigorous, yet reasonable, law enforcement agency. I then outlined to you an enforcement agenda for the agency's traditional deception, advertising substantiation and unfairness doctrines. Finally, I discussed the very high priority I would put on efforts to improve the FTC's relationship with the State Attorneys General and develop cooperative efforts to promote a national advertising policy.

It has been an active year. Advertising agencies, catalog sellers, and marketers to children, in addition to marketers of food and beverages, over-the-counter drugs, and other consumer

products all attracted attention from the FTC this past year. Of particular significance, the Commission since my last visit has:

-- held an advertising agency, Towne, Silverstein, Rotter, Inc., liable for false representations about the performance of toys shown in ads it produced;

-- held a toy manufacturer, Lewis Galoob Toys, liable for misleading advertising directed at children;

-- held a mail order company, Haverhills, liable for product claims in a catalog;

-- issued unanimous final decision (an exceedingly fine opinion by Commissioner Owen) involving advertising claims by Kraft for its cheese single slices, which should give substantial guidance to advertisers about how the FTC will interpret ads;

-- obtained a civil penalty ($375,000 against Sterling Drug) for violating a cease and desist order prohibiting unsubstantiated claims. This case is important because it is the first time the Commission has obtained civil penalties from an OTC advertising order for violations of a reasonable basis provision;

-- coordinated the handling of advertising investigations with a number of State Attorneys General in cases involving corn oil, vitamins, and a bogus AIDS cure;

-- obtained a final order against R.J. Reynolds Tobacco Company for its claims involving allegedly false and misleading advertising regarding the health effects of smoking.

-- completed several cases against the producers of "infomercials" and the makers of products sold via infomercials. One of these cases alone, against Twin Star Productions, resulted in a strong injunction and $1.5 million in redress to injured consumers; and

-- brought several cases involving deceptive advertising of 900-telephone numbers, a problem that has arrived practically full blown.

This afternoon I will also tell you about recent Commission actions involving Cisco fortified wine, Perrier water, and smokeless tobacco regulations.

This record shows a fair number of enforcement efforts during the past year, but it is important to distinguish the amount of activity from the reasonableness of the actions reflected in that activity. The challenge for the FTC in the 1990's is, I believe, to fashion a program that provides strong national consumer protection in a changing environment without unduly interfering with dynamic and competitive market forces. While I expect that this level of advertising activity will continue or even increase this year, I am gratified that the advertising community has responded well to our efforts to date. For example, in the mail order catalog case (Haverhills) and the ad agency/toy case (Galoob), not a single comment was filed during the 60-day public comment periods that followed the Commission's provisional acceptance of those orders.

While there are different possible explanations for the lack of comment, I would like to believe that the "better" one is that the advertising community understands the approaches and the legal standards underlying the complaints and orders in those cases. Individual commissioners and our excellent Bureau of Consumer Protection staff have worked hard to make sure that you and other associations -- business groups and consumer groups alike -- know about and understand the basis for our actions.

An important FTC action earlier this year was the Commission's decision in the Kraft case. This case challenged the accuracy of certain calcium content claims made for Kraft cheese singles products as well as comparative content claims. The Commission's opinion found that all but one of the challenged ads made the alleged claims.

Commissioner Owen's opinion is a clear statement of the Commission's approach to evaluating implied claims -- the central question of many advertising cases. Although the Commission determined that it did not need to rely on extrinsic evidence to interpret all but one of the ads challenged in this case, the decision does discuss the kinds of extrinsic evidence the Commission might find persuasive in future cases.

The Galoob consent agreement is important for a number of reasons. First, it is the Commission's first major enforcement action in the children's advertising area in almost a decade. It is also significant in that it followed a series of actions involving Galoob by your industry's self-regulatory body, the Children's Advertising Review Unit of the Better Business Bureau. Particularly in the children's advertising area we have looked to the industry self-regulatory process to address many of these concerns and one could certainly speculate that if the company had paid more attention to the self-regulatory units' questions about its ads, the company would have been less likely to become involved with the FTC.

Another significant point about the Galoob case is that the Commission also proceeded against Galoob's advertising agency. As I said last year, I believe the Commission's traditional advertising agency liability doctrine is an important tool to ensure compliance that should be used in appropriate cases. Under the FTC's ad agency liability doctrine, an agency that participated in producing an ad and knew, or should have known, that the ad was deceptive is equally liable with the advertiser for the deception. In my view, the allegations in the Galoob case are a clear illustration of an appropriate application of this doctrine. Unlike the complicated scientific questions that can arise over whether a health claim for a food, or a comparative efficacy claim for a drug, is substantiated by

particular testing,[1] there can be little question that an advertising agency should know the actual performance potential of the toys it prepares advertisements for. And let me make clear that in enforcing this doctrine, I do not believe the Commission is seeking to make advertising agencies' the guarantors of the accuracy of their clients claims. We are seeking to reinforce the very useful role the advertising agency review function plays in maintaining high levels of truthfulness in national advertising.

In another case involving a national advertiser, the Commission also provisionally accepted a consent agreement with Great Waters of France, Inc. and the Perrier Group of America, Inc. for allegedly false and unsubstantiated claims that Perrier mineral water is not processed, filtered, or treated before being bottled. The proposed consent agreement orders Perrier to cease misrepresenting the existence or the extent of processing of any

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[1] Compare Bristol-Myers, 102 F.T.C. 21 364-365, 1983), aff'd, 738 F.2d 554 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985) "In determining whether an advertising agency knew or had reason to know that an ad was false or deceptive, it is necessary to examine carefully the claim made in the challenged ad and the type of substantiation necessary to support the claim. Surely, an advertising agency cannot be required to conduct an independent investigation to determine whether a scientific claim had been established. However, with respect to certain claims, it may be that the disparity between the claims and the substantiation is so great as to preclude a conclusion that the ads in question were conceived through reasonable reliance on the substantiation provided by the manufacturer of the product."; with American Home Products, 98 F.T.C. 136 397-398 (1981), aff'd as modified, 695 F.2d 681 (3d Cir. 1982), modified, 101 F.T.C. 698 (1983), modified, 103 F.T.C. 57, modified, 103 F.T.C. 528 (1984).

mineral water. In my mind, the importance of this case is that advertisers must refrain from making allegedly false statements in their ads: if they do not, the FTC will take action.

Advertising of alcohol and tobacco products is another important area that has received the Commission's attention this year. When I spoke to you last year I outlined the role that I believed the Commission should play with regard to advertising of alcohol and tobacco products. I mentioned in particular that I wanted staff to promptly investigate allegations concerning the advertising and marketing of such products to young people.

In addition, to an ongoing look at this entire area of targeting of young people, staff has coordinated closely with the Office of the Surgeon General, the National Commission on Drug Free Schools and others within the government about their concerns with youth abuse of alcohol and use of tobacco.

Just this week, the Commission announced an important result of these joint efforts -- a consent agreement signed by Canandaigua Wine company for its marketing of Cisco. Cisco is a potent fortified wine with 20 per cent alcohol by volume, the equivalent of 5 one ounce servings of vodka. However, it is packaged and marketed like a low alcohol single serving wine cooler. This misconception is multiplied by the placement of Cisco in the refrigerated section of the liquor store or

convenience store with wine coolers and other single serving drinks and by point of purchase advertising which show models about to drink a whole bottle of Cisco. It is not surprising that consumers not only were confused but some were seriously injured. Thanks to the medical detective work of an emergency room physician at DC's Children's Hospital several cases were brought to light of children hospitalized with severe alcohol poisoning. From the time that the matter was brought to our attention in November 1990 until the order was accepted by the Commission this week, staff had worked closely with the Bureau of Alcohol Tobacco and Firearms and the Office of the Surgeon General to insure that Canandaigua repackaged the bottle in a nondeceptive fashion and removed allegedly deceptive advertising from point of purchase.

Staff has met on numerous occasions with industry groups who are trying to address issues of misuse of alcohol -- especially underage drinking and drunk driving. I am very heartened by some of these activities and look forward to working with both the alcohol industry and the advertising industry to see if answers from within the community are available.

Another important effort during the past year in this area has been completion of the Commission's rulemaking requiring health warnings on utilitarian items used to promote the sale of smokeless tobacco products. You may remember that when the

Commission originally published regulations implementing the Smokeless Tobacco Act, it exempted from the Act's health warning requirements utilitarian items for personal use such as pens, pencils, clothing or sporting goods. The D.C. Court of Appeals in 1989 disagreed with this conclusion, and ordered the Commission to require warnings on such items. We have now completed our efforts to do so after significant work by staff to deal with the many technical problems presented by applying this statutory scheme to utilitarian items.

My goal in the national advertising area has been and will continue to be to develop fair, economically rational, predictable, and understandable law enforcement policies and then to enforce them vigorously. As we continue to bring cases and take on as many other efforts as possible with our limited resources, our doors will always be open. I hope that the lack of comment on Galoob and Haverhills, and the encouraging response in general to our program, are reflections that there is some comfort within the advertising industry with the reasonableness of our actions.

In that regard, I note a story in last week's Advertising Age about the Commission's impact on the developing infomercial industry. I am pleased after a number of Commission law enforcement actions in this industry, to read quotes from public responses of the industry who not only do not complain about the

Commission's efforts, but rather suggest that we may be having the effect of helping the industry develop into a more mature and responsive one. To me, government enforcement and regulation at its best is not just putting notches on a belt, but helping support responsible business practices and protecting consumers at the same time. And if that approach can work for infomercials, I would hope it could work for 900 numbers, diet programs, and other industries as well.

Another significant development in advertising enforcement at the FTC during the last few months has not been a particular case or investigation. It has been the improved relationship between the FTC and the State Attorneys General. I am delighted that you will hear General Humphrey here today, as he surely has been one of the key players in this new cooperative approach. His efforts to coordinate with the FTC on "green marketing" matters have paved the way for other cooperation between the FTC and the States that few would have predicted not too long ago.

The active involvement of our Bureau of Consumer Protection Director, Barry Cutler, in three sets of hearings that State Attorneys General have sponsored into green claims and 900-telephone numbers proves that the States and the FTC are backing up their rhetoric with meaningful action. In addition, our consent orders with Miles and CPC-Mazola were developed in close cooperation with a group of State Attorneys General. They

demonstrate that the Commission and the States are indeed looking at the same kinds of issues, raising the same questions, and pursuing consistent remedies in many areas of national advertising.

Just last month, the FTC filed an action against an allegedly deceptive advertising campaign for a product called Immune Plus, a bogus AIDS remedy. In this case, there was an important "story behind the story." The Commission in its press release credited several government agencies, including the Texas and California Attorneys General, for their assistance and cooperation in the investigation. In the end, the States deferred their action until a federal lawsuit was filed. By the way, a federal district court in San Francisco granted a broad restraining order and later entered a preliminary injunction in that case.

These cases -- as well as several non-public ones still under wraps -- prove two important points. The first is that both the FTC and the States have heard the clamor for a single national advertising policy. There is a growing awareness that there cannot be 51 different approaches to advertising. There is an appreciation that national advertising of the product development programs that sometimes foster advertising can be chilled by disparate approaches to enforcement. The second is that the States do not have to disappear from the playing field

to achieve this goal. Our recent efforts show that the States can be active and productive players without any of us losing sight of the desirability of consistent enforcement approaches and legal standards. I look forward to working with the Attorneys General, many of whom are new, to continue building a successful working relationship. The National Association of Attorneys General Resolution for national standards for green claims leaves no doubt in my mind that the States see that possibility as well. And that is a good jumping off point to discuss the hottest advertising issue around.

If the 1980's were the decade of food and health claims, the 1990's appear so far to be the decade for environmental claims. Advertising Age no longer does single articles on "green marketing" issues; in January, it put out an entire special edition on the subject.

The green marketing issues demonstrate the convergence of several critical elements that one would expect to have the potential to generate chaos in the marketplace. On the one hand, surveys by Advertising Age and J. Walter Thompson report that consumers claim to care greatly about the environment--to the extent of being willing to pay more, perhaps up to 15 percent more, for products that are safer for the environment. Large numbers of consumers say that they would change their purchasing habits in other ways to help the environment. On the other hand,

the Thompson survey reported that only about 10 percent of those same consumers consider themselves knowledgeable about the environment.

It would thus appear that consumers are being attracted to products that make scientific or technical environmental claims that they do not fully understand and that they can not really evaluate for themselves. Add to this picture the fact that relevant knowledge and technology are changing so quickly that even scientists and knowledgeable environmentalists hesitate to make long-term predictions on some questions. You now have the necessary ingredients for a full-blown struggle between marketing and legal departments, not to mention government decision-makers and law enforcers. Mix in State and local regulations that have already come from Rhode Island to California and points in between, and you have a major challenge to consumers, industry groups, and government -- to try to bring order out of the vast potential for chaos.

The Attorneys General and the Federal government have made significant progress on green marketing issues during the past year, pursuing a number of law enforcement investigations. Many other investigations are continuing and, as I am sure General Humphrey will agree, more remains to be done.

"Topic A" in environmental marketing today is the nearly universal cry from all quarters -- the Congress, the National Association of Attorneys General, a broad range of industry and consumer groups, and a number of federal officials themselves--for some form of uniform national guidance on the use of key environmental terms in labelling and advertising.

Many difficult questions have been raised in the debate about environmental guidelines. For example, can guidance be given that is specific enough to meet the perceived need for certainty and uniformity, but is general enough to allow for rapidly developing environmental science? Can guidance be given about how to avoid deception in marketing claims, without inadvertently affecting environmental policy and the healthy competition between products, or packaging materials, or methods of solid waste disposal?

At the environmental hearings sponsored by a group of State Attorneys General in San Diego last December, one witness urged that the term "recycled" should be allowed only for products that contain a minimum percentage of post-consumer waste -- perhaps as much as 25 percent. Concern has been raised that the effect, if not the intent, of such a proposal may not be merely to prevent deception, but to establish product standards. In addition, it may be impossible to assess what effect such a standard would have on competition.

I believe that it is necessary that we move carefully and thoughtfully, and with as broad a range of viewpoint and base of information as possible, particularly from persons and groups with expertise on advertising, competition, and the environment.

To that end, the Commission agreed last month, at the invitation of EPA Administrator Reilly, to participate in a joint task force composed of the EPA, the United States Office of Consumer Affairs headed by Ann Windham Wallace, and the FTC. Of course, we will also continue to work closely with Skip Humphrey and the other Attorneys General who have not only taken the lead, but have proposed a set of interim recommendations for avoiding deception in marketing.

On February 14, the Commission received a petition for industry guides for environmental claims from a working group of trade associations and committees. This Valentine's Day present is on file along with other petitions and with the preliminary recommendations from the Green Report.

I am delighted to announce today that the Commission will hold public hearings into the various petitions, including the recommendations in the Green Report. I have asked the staff to make recommendations for the format and structure of the hearings. While none of us underestimates how difficult it is to

balance the many different interests, we are exploring various approaches to resolve these green marketing issues that are so important to AAF members, to manufacturers and retailers, and to consumers alike. I hope that these hearings will be a productive first step in the process.

In closing, I want to emphasize that the accomplishments of the past year have been those of the Commission and our first rate staff and not of the Chairman. It has been a pleasure for me to be a part of it all.