PREPARED STATEMENT

OF THE FEDERAL TRADE COMMISSION

BEFORE THE

TRANSPORTATION AND HAZARDOUS MATERIALS SUBCOMMITTEE

ENERGY AND COMMERCE COMMITTEE

U.S. HOUSE OF REPRESENTATIVES

NOVEMBER 21, 1991

Mr. Chairman, my fellow Commissioners and I are very pleased to appear before your Subcommittee today. This gives us an opportunity to address questions that have arisen since we spoke to you in April and to report on our enforcement program since that time. You have asked today that we testify "in regard to the Federal Trade Commission's shared responsibilities concerning advertising and labeling issues with the Bureau of Alcohol, Tobacco and Firearms (BATF), the Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA)."

The Commission formally or informally interacts and coordinates with a number of federal agencies on a regular basis. In some of these instances we share statutory jurisdiction and in others we merely share a common interest or a complementary expertise. For example, in the areas of food, over-the-counter drugs, cosmetics and devices, pursuant to statute, we share jurisdiction not only with FDA, but also with the U.S. Department of Agriculture for meat and poultry products. In addition, our interests overlap with those of the National Cancer Institute, National Heart Lung and Blood Institute and other nutrition and health agencies in the Department of Health and Human Services.

Responsibility for policing alcohol advertising and marketing is even more diverse. Not only does the Bureau of Alcohol Tobacco and Firearms have jurisdiction, but also FDA has some responsibility. For example, the FDA has jurisdiction for wines under 7% alcohol content by volume. Many of the issues in this area are shared concerns with the Office of the Surgeon General, the Alcohol Drug Abuse and Mental Health Administration, the National Institute on Alcohol Abuse and Alcoholism and even the Department of Transportation.

In the area of tobacco products, BATF has authority for taxes and some standards. In addition, the Department of Health and Human Services' Office of Smoking and Health and the Office of the Surgeon General, both take an active role in the tobacco area. Also, the Department of Treasury's Bureau of Customs checks tobacco imports. The Department of Justice has responsibility for the enforcement of the cigarette warning and the broadcast ad ban statute. We additionally work with the Federal Emergency Management Agency and the National Institute of Standards and Technology in the area of making cigarettes more fire-safe and we have a good relationship with the Department of Energy's Oak Ridge National Laboratory on tar and nicotine testing of cigarettes.

Sharing of jurisdiction is not limited to food, over-the-counter drugs, tobacco and alcohol. For example, we also share

jurisdiction with the Federal Communications Commission with regard to different aspects of the marketing of 900 number services, and with regard to broadcast advertising, including the so-called 30 minute commercials or "infomercials." Product safety is subject to the Consumer Product Safety Commission's jurisdiction, but the FTC has brought actions involving advertising that depicts toys being used in an unsafe manner.[1]

As the above indicates, the scope of the interrelationships of the FTC with other federal agencies is extremely broad. Our staff coordinates closely with the staffs of these other named agencies, in order to maximize the effect of the agencies' actions and to assure a coordinated approach under the various overlapping statutes. We believe our working relationships with other agencies have been cooperative and productive, and we are not aware of any contrary view on the part of our counterparts at those agencies. A recent and very visible example of our working with other agencies is in the environmental area. EPA Deputy Administrator Henry Habicht testified at our Environmental Marketing hearings in July:

> We think that these hearings represent a unique opportunity, and we think a precedent setting opportunity to meld concerns about the effective functioning of the marketplace and the effective protection of the environment. And the partnership

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[1] AMF Corp., 95 F.T.C. 310 (1980); Mego International, Inc., 92 F.T.C. 186 (1978).

among our agencies is a great step in the right direction.[2]

I. The FTC's Food Advertising Program and the Commission's Efforts to Coordinate with FDA

Let me begin first with a brief description of the Commission's food advertising program, and the legal standards under which we operate. The FTC's jurisdiction over food advertising is based on Sections 5 and 12 of the Federal Trade Commission Act.[3] These provisions prohibit advertising that: (1) makes express or implied deceptive claims, (2) fails to reveal information that is material in light of the claims made or that would be material with respect to the consequences resulting from the use of the product, (3) is unfair, or (4) makes objective product claims for which the advertiser did not have a "reasonable basis."

The Commission has always considered the area of food advertising to be one of its most important responsibilities, and it continues to remain of paramount concern today. Our program is active and vigorous. In the past two years we have resolved or issued complaints in 15 cases involving food and food

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[2] Transcript of FTC Hearing on Environmental Marketing Issues, July 17, 1991, page 10.

[3] 15 U.S.C. §§ 45 and 52.

supplements, and we now have pending about 30 investigations. Last month, we accepted for public comment consent agreements with Nestle Food Company and Pompeian, Inc. and issued a complaint against Stouffer Foods Corporation.[4] The cases recently resolved or under investigation address significant health issues, such as important nutrient content information regarding fat, cholesterol, fiber, sodium and percentage fat-free claims; and the entire gamut of health claims including cholesterol, fat and heart disease claims, fiber and cancer claims, and vitamins and cancer claims. These investigations underscore the Commission's commitment to maintaining an active program to protect consumers from deceptive and misleading claims which may impact on their health.

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[4] Nestle Food Company, File No. 912 3160 (Consent Agreement Accepted Subject to Final Approval Oct. 28, 1991), Pompeian, Inc., File No. 912 3002 (Consent Agreement Accepted Subject to Final Approval Oct. 28, 1991) see note 14 infra., and Stouffer Foods Corporation Docket Number 9250 (Complaint issued Oct. 28, 1991.)

The Nestle Food Company complaint challenged that claims that the Carnation Coffee-mate liquid was low in fat were deceptive. This case demonstrates that the Commission can take action when allegedly misleading nutrient descriptors are used in advertising.

The Commission's complaint against Stouffer Foods, Inc. reflects the concern that the use of an unqualified unit of measurement in the context of a particular food advertisement, which is inconsistent with that used on labels or in other common parlance, may mislead consumers about the amount of the ingredient in the product.

To understand the current relationship between FDA and FTC as it pertains to food advertising, it is necessary to look at the statutory framework under which the agencies operate. In 1938, the Congress amended the FTC Act to give the Commission primary jurisdiction over the advertising of food, over-the-counter drugs, and cosmetics.[5] Section 12 was added in 1938, making it unlawful to disseminate false advertising for any food, over-the-counter drug or cosmetic and also declared it to be an "unfair or deceptive act or practice within the meaning of Section 5." The Congress did not grant similar authority to FDA over advertising.[6]

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[5] Wheeler Lea Amendment, 52 Stat. 111 (1938).

[6] In the 1976 amendments to the Federal Food Drug and Cosmetic Act, Congress added several new sections to the Act. Notably, under Sections 707 and 403 (a)(2), the Secretary was given new authority with respect to the advertising of vitamin and mineral products, including some foods. Both the Senate and House Conference Reports, however, make clear that except as specified, no other authority over advertising was provided. The House and Senate Reports further confirm this limited change by recognizing the longstanding memorandum of understanding between FDA and the Commission, expressing the expectation that the coordination of regulatory actions was to continue, and also stating that the amendments were "not intended to modify the primary role of the Federal Trade Commission in exercising its regular authority over the false or misleading advertising of food products." See S. Conf. Rep. No. 743, 94th Cong., 2d Sess. at 31 (1976); H.R. Conf. Rep. No. 1005, 94th Cong., 2d Sess. at 31 (1976).

Prior to the 1976 amendments, in 1962, Congress gave FDA authority to regulate advertising for prescription drugs, set forth in Section 502(n). This authority was explicitly given and required FDA to implement its authority through formal rulemaking. FDA's regulations regarding prescription drug advertising can be found at 21 C.F.R. Part 202.

The Congressional construct gave each agency independent, but parallel and, in some instances, overlapping jurisdiction. In 1954 the agencies entered into a formal liaison agreement,[7] which has been amended twice,[8] to provide that the Commission would have primary responsibility for regulating the advertising of foods, over-the-counter drugs, devices and cosmetics, while FDA would have primary responsibility for preventing mislabeling of these products and the advertising and labeling of prescription drugs. The Memorandum of Understanding (MOU) also reaffirms the agencies' shared commitment to prevent deception of the public and to coordinate their work to eliminate duplication of effort, and to promote consistency in handling matters of mutual concern.

The two agencies have operated effectively under this MOU for the past 37 years, through changes in administrations, regulations and policies. The MOU formalizes the working relationship created by the overlapping responsibilities of the two agencies. It sets out the primary areas of each agency's responsibilities and establishes a means to coordinate those policies. We want to emphasize that the MOU is a procedural, not

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[7] Working Agreement Between FTC and Food and Drug Administration, 3 Trade Reg. Rep. (CCH) Para. 9,850.01 (1971).

[8] The MOU was first amended in 1968 to establish guidelines for the control of drug advertising, with the FTC given responsibility for over-the-counter drugs, and FDA for prescription drug advertising. Food Drug Cosmetic Law Reports (CCH) Para. 40,287 (1968). In 1971, the MOU was adopted updating and replacing the 1954 and 1968 agreements.

a substantive, document. It sets up a process for coordination between the two agencies, but it does not and cannot alter or amend the agencies' substantive statutory authority and responsibilities.

Since becoming Chairman, I have met personally with both former FDA Acting Commissioner James Benson and Commissioner Kessler in order to reaffirm the FTC's commitment to continued cooperation under the MOU. In addition, conversations between the agencies' staffs to discuss general policy and overall coordination on issues take place regularly, and there are frequent meetings between FTC and FDA staff working on specific enforcement actions. For example, FTC advertising staff and the staff of the Office of Compliance in the Food Center have arranged to have monthly meetings to keep abreast of FDA's enforcement activities. These regular meetings are in addition to meetings between the agencies' staffs on specific investigations. Such close cooperation is, in our opinion, strong indication of the two agencies' successful implementation of the MOU.[9]

Some of the issues that will face the FTC once FDA's regulations implementing the Nutrition Labeling and Education Act

[9] This productive working relationship is also evident in the drugs and devices area where the two agencies have established a semi-formal relationship to refer cases and discuss emerging issues of compliance.

of 1990 (NLEA), Pub. L. No. 101-535, 104 Stat. § 2353 (1990), are in place will be similar to those that we have previously addressed as part of our working relationship with FDA. These are, for example, which cases should each agency bring, which claims should be challenged, and how should we coordinate advertising and labeling jurisdiction so that information given to consumers is consistent. Other issues, such as the amount of evidence needed to support a health claim for food, or the nature and extent of appropriate disclosures, are not dissimilar from those on which we have dealt with FDA in the past.[10] It is our expectation, therefore, that the staffs of the two agencies will continue to meet and coordinate policy as FDA implements the requirements of the NLEA.

It is our understanding that the "Nutrition Advertising Coordination Act of 1991," (H.R. 1662), was referred to this

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[10] In the over-the-counter drug area, for example, we have traditionally relied on FDA's scientific expertise in evaluating substantiation for claims in advertising. Our policy has been to harmonize and coordinate with FDA's labeling requirements (warnings, directions for use). We have not required that advertising contain everything that FDA has mandated be on the label. Much of what is on the label would be unnecessary or even confusing in advertising. Finally, there have been instances in the last few years where the Commission has ordered that certain claims in advertising be halted despite the fact that FDA has not made a final determination regarding an over-the-counter drug's safety or efficacy and, thus, has taken no action against similar claims on labeling. United States v. Sterling Drug, Inc., No. CA90-1352 (D.D.C. June 21, 1990) (consent decree); Thompson Medical Co., 104 F.T.C. 628 (1984), aff'd, 791 F. 2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987); Warner-Lambert Co. v. FTC, 562 F. 2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978).

Subcommittee. H.R. 1662 would amend Section 15 of the FTC Act, 15 U.S.C. 55 (a), to provide that food advertising conform to certain FDA regulations implementing the NLEA. In particular, H.R. 1662 deems a food ad misleading if: (1) it contains a nutrient content claim that fails to comply with final FDA regulations; (2) makes a health claim concerning certain nutrients, such as fat, cholesterol, and fiber, unless the claim complies with FDA regulations; or (3) it uses a unit of measurement for nutrients different from the measurement used in final FDA regulations.[11]

The Commission has previously recommended that Congress not enact H.R. 1662 in a letter in response to an inquiry from Senator Slade Gorton. That letter is attached to our testimony. As noted in our letter to Senator Gorton, and because FDA has not yet issued its regulations implementing the NLEA, we believe that consideration of H.R. 1662 is premature. At this stage--during the comment period and before the FDA determines the final

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[11] In addition, H.R. 1662 provides that any nutrient content claim that would otherwise comply with final FDA regulations will, nevertheless, be deemed misleading if: (1) the cholesterol content claim is made and the level of fat or saturated fat is not disclosed; (2) a saturated fat content claim is made and the level of cholesterol is not disclosed; or (3) a high dietary fiber claim is made and the level of total fat is not disclosed; and (4) an otherwise complying nutrient content claim will be deemed misleading if the statement "See product label for complete nutrition information" does not appear clearly and conspicuously in the advertisement.

coverage of its regulations--it is difficult to gauge the precise effect of the regulations on our food advertising program.

We want to reiterate some of the points in that response that are especially relevant to this inquiry. First, the Commission agrees that there should be a consistent and coordinated approach among the federal agencies responsible for the regulation of food advertising and labeling. To that end, as it did before passage of the NLEA, the FTC intends to harmonize its enforcement policies with the FDA as the regulations are finalized to ensure a coordinated federal policy with respect to food advertising and labeling. However, as noted in our letter, we feel it is important that the Commission have the ability to take account of the practicalities of regulating advertising. For example, regulations enacted pursuant to the NLEA might require more extensive explanations of a health claim in food labeling than would be necessary for a television or radio advertisement. Moreover, there may be instances in which a claim approved by FDA for labels could be deceptive in the context of a particular advertisement.[12] Nonetheless, we want to emphasize that the Commission is committed to the goal of effectively

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[12] For example, the Commission's recent consent agreement with Nestle Food Company regarding its "low-fat" advertisement for its Carnation Coffee-mate Liquid illustrates how the context of an ad can dramatically affect the meaning of a claim. When used as the one tablespoon serving size suggested on the label for use in coffee, the consumer gets one gram of fat. When poured over cereal, however, in the approximate one half cup serving size ordinarily used, the consumer would get eight grams of fat.

preventing deceptive or misleading claims in food advertising without impeding efforts to communicate effectively valuable information to consumers.

Second, the Commission's current standards for food advertising claims are rigorous. The Commission's longstanding substantiation doctrine requires that all nutrition and health claims be supported by "competent and reliable scientific evidence." Competent and reliable scientific evidence, in turn, is defined in many Commission orders to require:

> evidence conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted by others in the profession to yield accurate and reliable results.

The NLEA allows health claims on food labels if the Secretary determines that:

> based on the totality of publicly available scientific evidence (including evidence from well-designed studies conducted in a manner which is consistent with generally recognized scientific procedures and principles), that there is significant scientific agreement, among experts qualified by scientific training and experience to evaluate such claims that the claim is supported by such evidence.[13]

Both standards require a high level of scientific support and have many common elements. Both standards look to the claim that is made in assessing whether there is adequate scientific support for that claim. Both standards require use of the

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[13] NLEA § 3(a)(2)(B)(i), 21 USCA § 343 (West Supp. 1991)

accepted methodologies of the relevant professions in assessing the reliability and accuracy of the evidence supporting the claim. Both standards require that the determination be made in the context of the entire body of available evidence.

The recent actions by the Commission in the Pompeian, Bertolli and Pacific Rice Products cases[14] demonstrate that advertisements cannot overstate available support for health claims and that "preliminary" or "inconclusive" science is simply not sufficient to substantiate claims under the FTC standard.

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[14] Bertolli USA, Inc., File No. 902-3135 (Consent Agreement Accepted Subject to Final Approval Sept. 5, 1991), Pacific Rice Products Inc., File No. 902-3018 (Consent Agreement Accepted Subject to Final Approval Sept. 5, 1991), and Pompeian, Inc.

The Commission's consent agreement with Bertolli, the largest olive oil marketer in the U.S., reaffirms three important principles of law of particular significance to food advertisers: (1) claims that a product's health benefits are scientifically "proven" or "established" cannot be based on preliminary or inconclusive studies; (2) substantiation for unqualified health benefits claims must consider the body of relevant evidence as a whole and not rely on isolated and unrepresentative studies; and (3) claims about the results of a particular study must be accurate and must not overstate the findings by omitting significant qualifications. The consent agreement with Pompeian reaffirms that food advertisers must have reliable scientific substantiation before claiming that their products provide superior health benefits to competing products.

The Pacific Rice consent agreement, which concerned allegedly unsubstantiated claims about certain health benefits of rice bran cereal, similarly illustrates that the Commission's ad substantiation doctrine prohibits unqualified health claims, that are based on preliminary and inconclusive studies.

Thus, the FTC standard has much in common with the NLEA. The FTC intends to work closely with the FDA to ensure a consistent Federal policy with respect to the levels of substantiation required for health claims in food advertising and labeling. Given the similarities between the two standards, we do not anticipate difficulties achieving such coordination.

Commission staff are currently reviewing the proposed NLEA regulations published in early November and are preparing a recommendation to the Commission to determine whether a formal comment to the FDA is appropriate. Such a comment could include a discussion of the application of some of the regulations to advertising. The Commission would be happy to provide the Subcommittee with a copy of any such comment.

We believe that, taken together, our food cases have established and will continue to establish a body of precedent against which food advertisers can judge the lawfulness of their proposed advertising. As this area develops, we will continue to explore ways in which the Commission can better communicate its enforcement position. However, we urge you to permit the two agencies to continue their work and to gain experience under the new statute, before considering what, if any, legislative measures may be needed to harmonize the government's approach to preventing deceptive and unsubstantiated claims in food labeling and advertising, respectively.

II. EPA, FTC and the Environment

The Federal Trade Commission and the Environmental Protection Agency have substantial areas of joint interest and have worked closely together in a number of areas. As with the FDA, there is a long history of coordinated activity. Thus, for example, EPA's fuel economy labeling program provides the basis for the FTC's Guide Concerning Fuel Economy Advertising for New Automobiles.[15] Similarly, the staffs of the two agencies have worked together in pursuing investigations of gasoline mileage savings devices and other energy savings claims, as well as investigations of and litigation against the manufacturer of such products as air and water filters.[16] The EPA staff has also provided substantial assistance to the Commission staff in the investigation of advertising claims for gasoline products. The

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[15] 16 C.F.R. Part 259 (1991). See also: Part 600-Fuel Economy for Motor Vehicles, 52 Fed. Reg. 47877 (1987) and Guide Concerning Fuel Economy Advertising for New Automobiles; Proposed Guide Amendment, 50 Fed. Reg. 11378 (1985).

[16] Nutronics Corp., Docket No. C-3281 (Jan. 16, 1990) (consent); TK-7 Corp., Docket No. 9224 (May 17, 1991) (consent); Newtron Products, File No. 882-3256 (Consent Agreement Accepted Subject to Final Approval. Sept. 5, 1991); FTC v. Craftmatic/Contour Industries, Inc., Docket No. 91-11448K. (D. Mass. May 21, 1991) (stipulated permanent injunction); North American Philips Corp., 111 F.T.C. 139 (1988).

Commission and EPA have also been working together in the area of safety claims in lawn care pesticide advertising.[17]

Finally, during the past two years the Commission staff has given a high priority to investigations of so-called "green marketing" claims in product labeling and advertising. In this area, the Commission is closely coordinating its activities with EPA, whose scientific expertise is necessary in order to help us evaluate many of the substantiation issues raised by environmental marketing. Specifically, EPA staff assists the Commission in evaluating such issues as ozone depletion, the degradability of plastics, papers and detergents in various disposal contexts and claims that particular products are recyclable or contain recycled content. In addition, the FTC is part of a joint task force with EPA and the U.S. Office of Consumer Affairs to coordinate federal activities concerning "green" claims and to ensure a consistent national response to the issue of environmental labeling and marketing claims. We have been working together to help ensure that consumer, advertising and environmental issues are addressed through a coordinated national effort. The task force is intended to enhance and coordinate, rather than supersede, environmental

[17] Since EPA does not have authority over advertising by lawn care service companies under the Federal Insecticide, Fungicide, and Rodenticide Act of 1947, as amended, 7 U.S.C. § 136, et. seq., but is more likely to receive complaints or other information concerning potential violations, EPA and the Commission have established procedures for EPA to refer such matters to the Commission staff for evaluation.

marketing activities currently taking place in each individual agency. Each agency intends to pursue its own responsibilities vigorously.

Environmental marketing issues pose complex regulatory challenges. First, although consumers have always been interested in the environment, public opinion polls indicate a recent dramatic increase in consumer interest in the environmental impact of the products they purchase.[18] Second, consumers' high level of interest in this area is not matched by an equivalent understanding of the often complex issues surrounding a product's impact on the environment.[19] Consumers wishing to purchase products that will not add to the solid waste problem, for example, may demand products labeled "degradable" or "photodegradable," not understanding that most solid waste is disposed of in landfills, which are designed to retard degradation. Finally, environmental science is itself complex and rapidly evolving; thus, there is little useful available precedent from the EPA and the FTC.

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[18] "The Environment: Public Attitudes and Individual Behavior," The Roper Organization, Inc. (July, 1990), "The Green Shopping Revolution: How Solid Waste Issues Are Affecting Consumer Behavior," Marketing, Research Service, Inc. (1990).

[19] For example, polls report that 70% of consumers believe that aerosol products contain ozone-depleting CFCs despite the fact that this ingredient has been banned in most consumer aerosols since 1978. Richard Bednarz, Chemical Specialties Manufacturer Association (H.T. pp 193-194, Vol. I) referring to an August, 1990 Roper Poll.

The Commission has underway more than 25 law enforcement investigations of consumer products including plastic trash bags disposable diapers, paper and plastic grocery store bags, aerosol sprays, and detergents. We have been investigating such product performance claims as: "degradable," "biodegradable," "recyclable," "recycled," "ozone friendly," "environmentally friendly," and "safe for the environment." The Commission has already accepted consent agreements addressing degradability claims and ozone claims, involving ozone safety, disposable diapers and disposable trash bags.

Two of these cases have been issued in final form and concern alleged claims that aerosol spray products were "ecologically safe," contained no CFCs, would not have a detrimental effect on the earth's ecology or were "ozone friendly" or "ozone safe."[20] The Commission's complaint alleged that although neither product contained chlorofluorocarbons (CFC used as an aerosol propellant in most products had been banned by the EPA in 1978), they both contained 1,1,1-trichloromethane, which is listed under the Clean Air Act Amendments of 1990 as a class I ozone depleter. This chemical, 1,1,1, has been found to cause environmental damage by contributing to the depletion of

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[20] The Commission accepted consent agreements in Zipatone Inc., C-3336, July 9, 1991 and Jerome Russell Cosmetics, Inc. U.S.A., C-3341, Aug. 21, 1991. A consent order is for settlement purposes only and does not constitute an admission of a law violation.

the ozone layer. The complaints and orders in these two cases provide guidance not only to these two companies but to all companies concerning standards that the Commission will enforce.

Two other cases deal with the issue of degradability.[21] One case dealt with claims that trash bags were allegedly "degradable," the other dealt with more specific claims in television and print advertising that disposable diapers were allegedly "biodegradable" and would biodegrade within three to five years. These actions, together with similar actions taken by the State Attorneys General, appear to have made substantial progress in curtailing the number of allegedly deceptive degradability claims in the marketplace.

During its investigations, the Commission has become more knowledgeable about consumer interests and understanding, as well as the emerging scientific questions within discrete areas, such as ozone claims and degradability claims. Additionally, each case can provide guidance to industry as to the limits of other types of acceptable claims.

A second major thrust of the Commission's involvement in "green marketing" has been to consider the need for FTC

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[21] American Enviro Products, Inc., (Consent Agreement Accepted Subject to Final Approval Aug. 30, 1991) and First Brands Corp., (Consent Agreement Accepted Subject to Final Approval Oct. 9, 1991).

guidelines. As you know, the Commission, in response to petitions from a coalition of trade associations led by the National Food Processors Association, the Green Reports from the National Association of Attorneys General, as well as petitions from two individual companies, held two days of hearings in July to consider comments on whether there is a need for Commission guidance and, if so, what form it should take. We heard from forty witnesses, representing federal, state and local government, trade associations, large and small businesses, market researchers, environmental groups, advertising agencies, certification groups, and the Better Business Bureau. We received more than 100 written comments, many supported by voluminous documentation. We expect the staff's summary of the comments and their recommendation shortly. The Commission considers this matter a top priority. However, we think it is important that the Subcommittee understand that any guidelines the FTC might decide to issue in this area would necessarily be limited to the question of deception and substantiation for environmental marketing claims and not directed toward establishing environmental policy.

On November 13th and 14th EPA held hearings to determine what guidance, if any, it can give for the use of the terms "recycled" and "recyclable." The FTC participated in those hearings. EPA's stated purpose for these hearings was to encourage "the trends toward (1) the increased use of recycled

materials in products and (2) the increased recovery of materials for recycling."[22] It, therefore, sought specific comment on the use and definition of these terms. The Federal Register Notice from the EPA illustrated that many difficult questions remain to be answered. The EPA's separate activity concerning environmental terms also demonstrates the high level of coordination that is occurring. The EPA stated in notice that its ultimate purpose is to "share the information we are gathering with [the FTC], which may serve them in the development of industry guides. EPA stands ready to assist FTC in any way possible to ensure that the environmental policy needs discussed in this notice are addressed in an effective and coordinated way by the guides." We look forward to reviewing the comments EPA receives as well as its recommendation. The EPA notice stated that if the FTC were not to develop industry guides EPA would publish its recommendation as guidance for industry and consumers.

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[22] Guidance for the Use of the Terms "Recycled" and "Recyclable" and the Recycling Emblem in Communicating Marketing Claims, 56 Fed. Reg. 49992 (Oct. 2, 1991).

III. Bureau of Alcohol Tobacco and Firearms, The Office of the Surgeon General, the FTC, and Alcohol Advertising and Marketing

FTC's jurisdiction over the advertising and marketing of alcoholic beverages is based on Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices." BATF's statutory jurisdiction over alcoholic beverage advertising arises under the Federal Alcohol Administration Act of 1935.[23] Section 5(f) of the FAA Act prohibits "false," "misleading," "obscene," or "indecent" matters, and certain objective facts "irrespective of falsity," which the Secretary of the Treasury finds to be likely to mislead the consumer. Additionally, Section 5(f) confers the authority to require mandatory information "as will provide the consumer with adequate information as to the identity and quality of the products advertised." Finally, BATF pre-approves package labels for distilled spirits and wine products containing more than 7% alcohol to ensure that consumers receive proper information.[24]

Thus, both the FTC and BATF have shared jurisdiction over deceptive alcohol advertising, although the FTC's jurisdiction alone extends beyond advertising and labeling to cover other promotional practices. Perhaps because of the specificity and

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[23] 27 U.S.C.§ 201 et.seq. (1935).

[24] 27 U.S.C. § 205.

encompassing nature of the BATF implementing regulations, most alcohol advertising does not contain objective product claims, but relies more on images, moods, or themes. This type of advertising is generally less conducive to deceptive claims. When issues of deceptive alcohol advertising have arisen, the FTC has typically deferred to BATF action, especially where BATF has either preapproved a label or has specific advertising regulations on the question or has taken specific action. However, as illustrated by the FTC's and BATF's parallel investigations of Canandaigua Wine Company and its fortified wine product, Cisco, there clearly are times when both agencies work together to protect the public from allegedly deceptive marketing practices.

In late November 1990, BATF requested the FTC's assistance in addressing concerns that Cisco's marketing and packaging deceived consumers. Specifically, BATF and FTC staffs were concerned that consumers were being misled into believing that the product, which was a potent fortified wine (20% alcohol by volume), was a low alcohol wine cooler because its bottle and label strongly resembled those of wine coolers and it was often sold from the same shelf position as wine coolers. However, because the product's packaging was in technical compliance with BATF regulations, BATF was unsure as to whether the actions it could take would adequately address all of the problems associated with the promotion and marketing of the products.

The FTC staff initiated an investigation into the alleged deceptive advertising and marketing of Cisco. The investigation indicated that the product did indeed strongly resemble a low alcohol wine cooler and that the company's advertising and marketing practices exacerbated this problem. The investigation also indicated that some consumers, including minors, had been confused, had consumed Cisco as if it were a wine cooler and had suffered acute alcohol intoxication requiring treatment at the hospital.[25]

While negotiating the consent agreement with Canandaigua, Commission staff worked closely with BATF and with the Office of the Surgeon General. BATF and the Surgeon General met individually with Canandaigua to resolve concerns over the label and bottle characteristics. The FTC, BATF, and the Surgeon General conferred regularly to coordinate their mutual efforts. The joint efforts of the three agencies led to the swift completion of the investigation and the broad scope of relief afforded consumers.[26]

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[25] The medical detective work of Dr. Joseph Wright, an emergency room doctor at D.C. Children's National Medical Center, led to the discovery of the unusual number of emergency room admissions involving Cisco.

[26] Canandaigua Wine Co., C-3334 (June 26, 1991) (Consent). A consent agreement is for settlement purposes only and does not constitute an admission of a law violation. Under the terms of the consent agreement, Canandaigua is prohibited from representing that Cisco is a low-alcohol product, that a bottle (continued...)

As a result of the Cisco investigation, the subsequent advertising of the so-called "power" beverages, and the reports of the Inspector General (IG) of the Department of Health and Human Services (HHS), the Office of the Surgeon General, BATF, and the FTC have now formed an informal working group, and the various offices meet periodically to exchange information and expertise. In addition, an Interagency Task Force is headed by the Surgeon General and composed of BATF, FTC, FDA, and the Alcohol, Drug Abuse and Mental Health Administration of HHS. This group is charged with examining alcohol labeling issues raised by low and high alcohol content beverages. FTC staff has worked closely with the other agencies, and the group is expected to produce recommendations in late November.

In addition to its investigation of Cisco and efforts as part of the Surgeon General's task force, the Commission staff has been conducting other investigations of the advertising and marketing practices of certain alcoholic beverage companies to determine whether, and to what extent, they target young people. We would like at this time to report on some of those inquiries to the extent that we can consistent with our statutory

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[26](...continued)
of Cisco contains a single serving, and from encouraging retailers to display Cisco near low-alcohol products such as wine coolers. The consent also required the company to change the shape and color of the bottle to decrease its similarity to a wine cooler bottle.

requirements of maintaining the confidentiality of company specific information that the Commission obtained pursuant to process or voluntarily in lieu of process on a confidential basis.[27]

The Commission staff has been conducting an inquiry of advertising and promotional practices of some brewers on college campuses. During this inquiry, the staff has found evidence of advertising and promotions for alcohol directed to audiences composed of a substantial number below the legal drinking age and in some instances to audiences composed entirely of those below the legal drinking age.

The investigation has raised difficult legal questions and challenging policy issues.[28] Staff's investigation focuses on six areas of promotion and advertising that appear to be in widespread usage on many college campuses: the use of students as

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[27] Section 21(b) of the FTC Act, 15 U.S.C. 576-2(b), prohibits the Commission from disclosing information obtained pursuant to compulsory process without the consent of the submitter. Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f) protects from public disclosure information obtained by the Commission voluntarily in lieu of process in a law enforcement investigation. Under Commission Rule 4.10(d), 16 C.F.R. 4.10(d), the Commission has waived its discretion to make public any information submitted voluntarily in lieu of process on a confidential basis in a law enforcement investigation.

[28] The inquiry is made more difficult by the distribution system. Brewers sell through independent distributors who themselves may conduct their own advertising and promotional activities on campuses. Sometimes these activities are partially underwritten by the brewers, but not always. Staff's inquiry focuses primarily on the brewers.

campus marketing representatives; the sponsorship of campus recreational events; advertisements in campus media; the sale or giving away of logoed promotional items, such as t-shirts and hats; the use of billboards and signage, and the special promotional activities associated with spring break. All of these advertising and promotional techniques are, in themselves, in other contexts, legitimate marketing tools, used by numerous industries to bring products to the attention of potential consumers. What is unique about this situation is that a substantial portion of the audience exposed to these ads and practices is under the legal age to purchase the product.[29]

The staff's investigation has found that even though all state laws outlaw the sale of alcohol to persons under 21, several beer companies and/or their distributors continued to employ college students to maintain contacts with student organizations, such as fraternities, dorms, and clubs, and to market beer to these student organizations. The investigation has also indicated that these campus representatives may have also helped the organization plan and promote parties and other events at which beer could be served. In addition to helping plan the events, some campus representatives sell the beer, and deliver the beer to the event itself. This allowed student

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[29] The summary that follows in the text is based almost exclusively on staff investigation of the brewers' activities on college campuses. In a few instances, information from other sources is provided but it is footnoted as to its source.

organizations to purchase the product without going to a licensed retail outlet. Generally, the sale or distribution at the parties is controlled by the students themselves, absent university rules to the contrary.[30]

The staff's investigation indicated that companies also sponsor numerous recreational, intercollegiate and intramural sports events and even finance entire athletic programs at some colleges. They have provided support for such activities as games, teams, clubs, and leagues in return for publicity on posters, signage, programs, public address announcements and team uniforms or t-shirts. Undergraduate fraternities and sororities have received sponsorship money for events such as inter-fraternity athletic competitions, recreation events, and even for rush events for incoming students, where almost all of the participants are below 21. In exchange for their sponsorship, the companies receive consideration in the form of having their corporate and brand names on t-shirts, posters, and banners, and on rush materials distributed to the undergraduate population. In addition, companies have sponsored a substantial number of recreational events and parties for dormitories including occasionally parties in freshman dorms where almost all the students are between 17 and 19. They also have provided money, displays, and utilitarian items in support of numerous pep-

[30] Some states, such as Utah, have made it illegal for alcoholic beverage companies to have student representatives.

rallies, homecoming events, concerts, and festivals on campuses each year. Finally, many brewers purchased permanent and temporary billboard space on campus and provided large inflatable displays of beer cans or other easily recognizable corporate symbols for outdoor events on campus, which they sponsor.

It has been reported by other government agencies that approximately 35% of all college newspaper advertising revenue comes from alcohol advertising.[31] Our own investigation revealed that advertising for alcohol beverages has also been prevalent in student handbooks, calendars, programs for sporting events, and are broadcast on student radio and television stations.

The last area that the staff examined was marketing and promotional activities surrounding spring break. Spring break and its colder cousin, winter ski vacation, are often advertised in advance on campus. Staff's on-site investigation at Daytona Beach in 1990 confirmed that the participants at spring break include a significant number well under the drinking age and that little or no effort was made to exclude minors from participation in most of the brewer-sponsored events that included heavy promotion and advertising of beer products.

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[31] Office of Substance Abuse Prevention, Alcohol Drug Abuse and Mental Health Administration (OSAP), U.S. Dept. of Health and Human Services, White Paper, "Alcohol Practices, Policies, and Potentials of American Colleges and Universities" at 43 (Feb. 1991).

Following media attention, growing public concern and governmental inquiry, brewers have limited their presence at spring break destinations. In 1991, the Surgeon General announced that the three major brewers restricted their promotional activities at spring break.[32] As a result, none of the brewers erected huge inflatable beer cans or activity tents on the beaches. Another brewer terminated its ties with MTV broadcast of the events. This does not mean that the promotions disappeared, but it appears that they moved to a smaller scale on the distributor and retail level.

Whether brewers' activities on college campuses discovered during the staff's investigation violate the FTC Act or whether violations, if any, could be remedied by formal Commission actions, are difficult questions. We cannot properly prejudge them here, given the ongoing nature of our investigation. Moreover, it may well be that this problem is one in which the Commission's most constructive role is to report its findings to those with responsibility for national health policy, as we are doing here. During the course of staff's investigation, discussions were held with individual industry representatives regarding possible changes to the advertising and promotion of alcoholic beverages on college campuses. Some of the companies seemed genuinely interested in addressing some of the perceived

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[32] See, e.g. "Brewers Quit Spring Break, But the Controversy Lingers," Adweeks Marketing Week (March 4, 1991).

concerns. We hope the companies will continue to review their advertising and marketing strategies and develop constructive responses.

Conclusion

The areas that we have addressed today are among the most challenging issues faced by the Commission. Each area has certain similarities in terms of shared jurisdiction with other agencies and wide consumer appeal and interest. However, each is unique and the Commission cannot treat each area the same. I hope we have conveyed that the Commission always attempts to ensure that our actions are consistent with those of our sister agencies and other articulated federal policies.