

ANY GOVERNMENT DECISION BANNING ALCOHOL ADVERTISING MUST BE WEIGHED ON A FIRST AMENDMENT SCALE

December 4, 1996

A debate has arisen about whether the Federal Communications Commission (FCC) ought to step in and commence proceedings looking toward regulating hard liquor advertising on television and radio. The FCC Chairman, Reed Hundt, has suggested that if broadcasters agree to air hard liquor ads, government action is the answer. "If the public interest would be served by our inquiry into the use of the airwaves by the hard liquor industry and broadcasters who carry their ads, then we have no excuse for inaction," he said. Commissioner James H. Quello has called for congressional, not FCC, action on the matter. "The issues raised by hard liquor advertising constitute a very difficult legal and factual no man's land -- one that only Congress can effectively cross," he said. Commissioner Susan Ness has agreed with Commissioner Quello that it would be best for Congress to take action, but she would not rule out FCC action. All of us have called for broadcasters to be responsible and responsive to community concerns on this important issue.

This debate was prompted by an announcement by the Distilled Spirits Council of the United States (DISCUS) that its members have ended their long standing voluntary policy of avoiding TV and radio advertising. The new DISCUS code, while not banning TV and radio advertising, urges producers and marketers of distilled spirits to "encourage responsible decision-making regarding drinking of alcohol by adults, and discourage abusive consumption of their products." Other provisions of the code call for responsible content in liquor ads and responsible placement, so that the advertising is not intended to encourage underage drinking.

The reason for the policy shift is essentially economic. DISCUS members argue that because beer and wine producers advertise their products on broadcast stations, the hard liquor industry should do so as well, in order to effectively compete. A handful of broadcasters have indicated that they intend to accept hard liquor ads and have begun airing them.

A firestorm of protest from groups like Mothers Against Drunk Driving (MADD) arose when the DISCUS announcement was made. I share the concern of MADD and others who do not want our children tempted by broadcast advertising that may encourage them to drink hard liquor. This may lead to increased teenage drunk driving and other alcohol abuse by teens. MADD and other public interest groups have called on the FCC to begin administrative proceedings looking toward banning or limiting alcohol advertising. While I am sympathetic to these pleas, I do not believe that FCC action is the best course.

First, to the extent that parties argue the advertising may be misleading or deceptive, the Federal Trade Commission (FTC), not the FCC, clearly has primary jurisdiction. The FTC has the expertise to evaluate advertising practices and recommend further action, if needed. In fact, the FTC has just commenced an investigation into this issue, thus, there is no need for the FCC to duplicate this effort.

Second, to the extent that parties seek a legislative judgment that even truthful, non-misleading advertising should be limited or banned, we must recognize that such a government restriction would be subject to special constitutional scrutiny. The government would have to show that restrictions on alcohol advertisements are needed to advance a substantial government interest. Just last term, the Supreme Court held that a Rhode Island law that banned advertisements of liquor prices could not pass this test.⁽¹⁾ Given the strength of this decision, it is clear that any restriction on broadcast advertising of alcohol would be constitutionally suspect.

The Supreme Court's decision stands as a reminder of the importance of preserving our First Amendment rights. I believe that any government decision to limit or ban alcohol advertising should be carefully considered and weighed against its infringement on free speech. I see a better solution. The National Council on Alcoholism and Drug Dependence, Inc. (NCADD) has proposed counter advertising measures that would educate the public about the "health and safety issues associated with immoderate drinking."⁽²⁾ NCADD is on the right track -- the solution is more information, not government censorship.

In any event, any FCC-devised ban on liquor ads would face a particularly high hurdle in the courts. There is no statute that bans or limits alcohol advertising on the broadcast medium. Any restrictions this agency would devise would have to be based on a conclusion that such advertising would be contrary to the public interest. Such a conclusion would involve difficult social and factual judgments that are beyond our expertise, and thus, would be unlikely to survive judicial scrutiny.

The En Banc decision of the D.C. Circuit in ACT III,⁽³⁾ which dealt with restrictions on broadcast of indecent speech, indicates that Congressional action limiting speech is more likely to withstand judicial review. In ACT III, the court approved congressionally-mandated channeling of indecent broadcasts to hours when fewer children are in the audience, even though it had previously rejected the FCC's channeling approach. The court explained the difference by noting that the prior decision "involved an assessment of the constitutionality of channeling decisions that had been made by the FCC on its own initiative; here we are dealing with an act of Congress which, as the Supreme Court has pointed out, enjoys a 'presumption of constitutionality' that is not to be equated with 'the presumption of regularity' afforded an agency in fulfilling its statutory mandate."⁽⁴⁾

The caselaw developed at the time when the ban on cigarette advertising were imposed also suggests that Congress is the appropriate body to make a decision regarding liquor advertising. In the case of cigarette advertising, appropriate entities such as the Surgeon General and the Federal Trade Commission made decisions within the scope of their expertise and jurisdiction that ultimately led Congress to conclude that cigarette advertising on the broadcast medium should be banned. Congress passed a law, and the courts affirmed this Congressional judgment.⁽⁵⁾

Finally, I note that the hard liquor industry has made an argument that it may be inequitable for the FCC to allow the beer and wine industry to advertise on television and radio, but not the hard liquor industry. If the FCC were to decide that it is contrary to the public interest for broadcasters to air hard liquor advertising, the issue arises of whether it also ought to be banning the advertising of beer and wine. The drinking of beer and wine by underage individuals may lead to the same societal ills feared by MADD and similar groups. All these products -- beer, wine and hard liquor -- are legal products for purchase by adults. For the FCC to differentiate between hard liquor vis-a-vis beer and wine could be seen as arbitrary and capricious to a reviewing court, especially when the FCC's expertise does not extend to such

judgments.

In light of all of the above, I believe that the issue of advertising practices by the hard liquor industry would be best left in the hands of our sister agency, the FTC, to address these issues in its ongoing proceeding. If further action is warranted, Congress is in the best position to decide what government action may be appropriate.

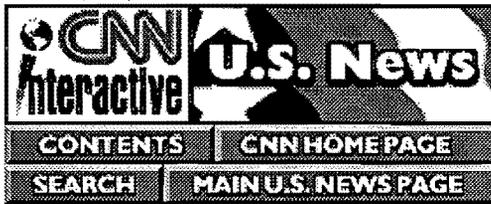
In the meantime, I strongly encourage all broadcasters and advertisers to be responsible and responsive to the concerns about alcohol advertising. We do not want to encourage underage drinking or drunk driving, and any voluntary actions they can take should be done as good corporate citizens. Such voluntary actions could include airing the ads during hours when children are not likely to be watching, screening the advertisements for appropriateness, or perhaps developing and airing counter advertisements to educate the public about the hazards of drinking.

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FOOTNOTES

1. See 44 Liquormart, Inc. v. Rhode Island, 116 U.S. 1495 (1996).
2. Letter from George McGovern, NCADD Board of Directors, to Rachele Chong, November 25, 1996.
3. Action for Children's Television v. FCC, 58 F.3rd 654 (1995), cert. denied 116 S.Ct. 701 (1996).
4. 58 F.3rd at 669, citing Motor Vehicle Mfrs. Assn v. State Farm Mutual Auto Insurance Co., 463 U.S. 29, 43 n. 9 (1983).
5. See Capital Broadcasting Company v. Mitchell, 333 F.Supp. 582 (D.D.C., 1971) aff'd, Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

||[Commissioner Chong's Homepage](#) ||[FCC Homepage](#)||



Liquor ads pour back onto airwaves

Decades-long voluntary ban lifted

June 12, 1996

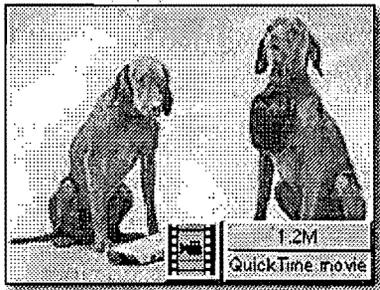
Web posted at: 12:20 a.m. EDT

NEW YORK (CNN) -- For nearly half a century, there was a prohibition on hard liquor advertising on television. But with sales of spirits dropping, the industry is jumping off the self-imposed wagon.



Seagram has already taken steps toward ending the long, dry spell for hard liquor commercials. The company has begun a month-long series of 30-second commercials for Crown Royal whiskey on an NBC station in Corpus Christi, Texas.

Seagram's new Crown Royal commercial



Advertising hard liquor has never been against any federal law, but most liquor companies have stuck to a voluntary ban.

But no more, Seagram says.

"The fact that beer and wine is allowed to advertise is very unfair, because when it comes right down do it, alcohol is alcohol is alcohol," said Seagram Vice President Arthur Shapiro.

But critics say rationalizing is rationalizing.

"We are extremely disappointed Seagram has chosen to target America's children, as the brewers have been doing on TV for the last 40 or 50 years," said George Hacker of the Center for Science in the Public Interest.

STATEMENT OF FCC CHAIRMAN REED HUNDT
ON NCADD PETITION ON ALCOHOL ADVERTISING
MAY 14, 1997

Yet more concerned citizens have asked the FCC to take a hard look at the issues raised by the introduction of hard-liquor advertisements on television. It is the FCC's statutory duty to ensure that the public airwaves are used in the public interest.

The National Council on Alcoholism and Drug Dependence, and co-signors, argue that, in order to offset the risks to kids posed by alcohol ads, the FCC should require broadcasters to provide counter-advertising to inform young people about the dangers of drinking. This approach had a tremendous effect when it was applied to cigarette ads in the late 1960's, and should be considered here. A Notice of Inquiry would allow us to consider counter-advertising, as well as proposals made by others.

- FCC -

[[text version](#)]

July 9, 1997

Comments of Commissioner Rachelle Chong at FCC Agenda Meeting

Mr. Chairman: I cannot, in good conscience, vote to open an FCC inquiry into liquor advertising.

I too am very concerned about the serious societal problems of alcoholism, underage drinking and drunk driving. I do not believe, however, that this proposed FCC Inquiry is the best way to address those issues. I think these issues are best handled directly through enforcement of the laws against misuse of alcohol, not indirectly through this proposed inquiry.

I understand the arguments that some alcohol advertising may be misleading and may encourage underage drinking. I agree that these are important issues that should be dealt with by government authorities.

To the extent liquor advertising is misleading or directed to underage audiences, however, the right authority to take action is the Federal Trade Commission. The FTC has expertise on advertising matters. Indeed, the FTC has two ongoing investigations of alcohol advertising. Moreover, we have a longstanding agreement with the FTC that says the FTC "will exercise primary jurisdiction over all matters regulating unfair or deceptive advertising in all media, including the broadcast media." Why can't we let the FTC do its job? After all, this agency already has a huge workload, and we shouldn't duplicate the efforts of other parts of the government.

I am not persuaded by arguments that the FCC should investigate truthful liquor advertising directed at adults because of our mandate to ensure that broadcasters serve the public interest. In my view, the FCC's general public interest mandate is not a plenary authorization to conduct broad-ranging inquiries — ultimately aimed at dictating program content. This characterization of the public interest mandate puts us on a slippery slope — a slope leads away from important First Amendment freedoms.

As the Supreme Court has recognized, truthful advertising — including liquor advertising — is entitled to protection under the First Amendment. We cannot ignore this holding of the highest court in the land.

Moreover, from a practical point of view, if we start this investigation under our broad public interest mandate, would we then have an obligation to also investigate car advertising that features air bags and sugared cereal advertising? I see no logical or constitutional distinction between the arguments about liquor advertising and any other legal product where health and safety concerns have been raised.

Now, there is a way to make reasonable judgments about whether the FCC should investigate truthful advertising of legal products. The courts have told us we should look to the law. You see, in the past, the courts have recognized that a Congressional judgment — as expressed in a statute — that the FCC ought to restrict the advertising of certain products is entitled to judicial deference. So, I believe we must look to whether Congress told us to look at the liquor ad issue or not. Congress has not passed such a law.

I disagree with two of my colleagues that this Notice is "just a simple fact finding." Having read the Notice, it goes well beyond mere fact finding. First, the Notice assumes there is a problem that the FCC should fix, pursuant to our public interest authority over broadcasters. Second, the Notice asks about regulatory means to solve the problem, such as ways to ban, counter and restrict liquor advertising, including such things as requiring a V-chip type approach to allow viewers to block out certain ads. In my view, it is not "neutral" to tell the broadcast industry that it is responsible for a bigger societal problem, and ask whether they or the government should do something about it.

Mr. Chairman, because of the foregoing, I respectfully will not vote to approve this item.

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[[text version](#)]

July 9, 1997

**Press Statement of Commissioner Susan Ness
Regarding
Proposed Notice of Inquiry on Broadcast Liquor Advertising**

Today, the votes of two Commissioners prevent this agency from initiating an inquiry on broadcast liquor advertising. We have been asked to look into the matter by a dozen States, a bipartisan group of 26 Members of Congress, scores of public interest, parent, and community organizations, and even the President of the United States. I am willing to respond positively to their requests.

Adoption of the proposed Notice of Inquiry would have commenced a process in which all interested parties could have debated all of the relevant issues, openly and publicly. Instead, what should have been a robust debate has been foreclosed, at least at this time and in this venue, before the process of seeking public comments has even begun. Neither the First Amendment nor the Communications Act is well served when debate is suppressed.

The proposed Notice of Inquiry is responsible, responsive, and restrained. It embodies no findings of fact, no tentative conclusions, and no proposals for regulatory action. A variety of measures have been proposed by various organizations, but the Notice wisely does not prejudice the desirability of any of these proposals or the Commission's legal authority to adopt them. I cannot understand how anyone could conclude -- with no public record and no participation by interested parties -- that the Commission cannot even conduct an inquiry without violating the Communications Act or the Constitution.

Parents' organizations and others concerned with alcohol abuse have come to us, not because they think we have special expertise on the subject of alcohol abuse, but because they recognize the power of television in everyday life and they know that the FCC is tasked with assuring that broadcasters serve the public interest, convenience, and necessity. To these people, the issue of broadcast liquor advertising is unquestionably within the purview of the FCC. I agree.

It has been alleged that the proposed inquiry would "duplicate" the work of the Federal Trade Commission. Not so. While unconfirmed news reports indicate that the FTC has confidential, company-specific investigations under way, these proceedings do not provide an opportunity for widespread public participation, do not create a public record, and do not fully ventilate the panoply of relevant legal and public policy issues. No agency other than the FCC can provide (or has been asked to provide) the kind of forum that will permit a full discussion of these issues.

The controversy over liquor advertising on television will not disappear. The many, many voices calling for us to look into the issues will not be silenced, and I do not doubt that citizens will continue to look to the Commission to provide a forum in which all parties will be permitted to present the facts and arguments they believe to be relevant. In my judgment, we can and should provide that forum.

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[[text version](#)]

July 9, 1997

STATEMENT OF FCC CHAIRMAN REED HUNDT ON BROADCAST ADVERTISEMENTS OF HARD LIQUOR

I was pleased to present to the Commission today for public debate and public vote the proposal to conduct an inquiry into the issues raised by hard liquor advertising on television and radio. Who's carrying the ads? What should be done about this troubling new development in the use of the public's airwaves? Why shouldn't we give the American people a report on these issues, after taking public comment from any and all, and after asking broadcasters to tell us how they feel about this issue?

Commissioners Ness and I voted to conduct an inquiry into these issues. However, Commissioners Quello and Chong have voted not to conduct this inquiry. A tie vote means that the notice does not issue at this time. I am glad that the public has a chance to judge the wisdom of the Commission's decision today by virtue of our open and public discussion and vote. Plainly, the tie vote means the debate about the wisdom of opening broadcast TV to hard liquor is far from over. It's a good day when the commissioners each make public their thinking and their votes on important issues, such as those presented by the hard liquor industry's attempt to get their ads on broadcast TV, for the first time since TV became the widespread phenomenon it is in America.

In the debate among commissioners and among private parties and government officials about the new hard liquor TV advertising campaign and the appropriate response by the FCC, the public's steward with respect to use of the public's airwaves, I think there are a handful of plain truths that ought to be clearly stated:

- first, of course the Commission has the jurisdiction to conduct an inquiry into any use of the public's airwaves. Any assertion to the contrary is risible.
- second, when the President, the Attorney General, 26 Members of Congress, 15 Attorneys General, and over 240 public interest organizations ask us to conduct an inquiry into a matter over which we have jurisdiction, we should generally willingly and enthusiastically do so without hesitation or purpose of evasion; and
- third, the existence of a private document gathering at the FTC into certain alcohol ads neither precludes FCC action nor explains any unwillingness to act on our part.

In any event, such questions as the extent to which hard liquor ads are now being carried on broadcast TV and the appropriateness of such ads are precisely in our bailiwick, as the proposed Notice of Inquiry indicated. The Notice proposed to reach no conclusions about what, if anything, should be done about this new development in broadcast history. It merely sought to permit a public record to be made on the pertinent issues.

How can anyone justify curtailing this legitimate inquiry? No one disputes that the issues are important. Indeed the commissioners who oppose this inquiry publicly proclaim that the introduction of hard liquor ads on broadcast TV is troubling. So why don't they want to learn the facts and the law, through a public recordmaking, that would permit the FCC at the very least to report to Congress, the Administration, and the American people about what is going on here, and what the possible responses may be?

And why don't broadcasters and the hard liquor industry join in supporting a fair and open inquiry? What are they afraid of? Why are they together in their unwillingness to have an open proceeding, where facts and laws can be cited and debated? It would not be sound or responsible for anyone to mistake or mischaracterize the scope and content of the proposed notice. The proposed Notice of Inquiry laid out all the important questions without bias or slant. It asked for comments on the petitions and proposals that the FCC has been receiving in droves. The NOI did not advocate a rule or take a position. It merely asked some important questions and sought comment from interested parties and the public, such as:

- how many broadcasters have carried these ads? at what times? during what programs? what number of underage viewers is estimated to have seen these ads? Many broadcasters have rejected these advertisements

- why? What policies have been developed?
- should the unique features of TV inform our evaluation of the effect of hard liquor ads?
- what do scientific studies show about the link between advertising and underage consumption? what information do other expert governmental agencies have on this issue?
- how should we respond to the State of Alaska's petition (joined by 13 States and Puerto Rico) proposing that we ban these ads?
- what about the National Council on Alcohol and Drug Dependence and MADD's petition that we require counter-advertising?
- what about the proposal that we channel these ads?
- what about pending legislation, or legislation that might be proposed?
- what is the authority of the FCC to act in this regard?
- what are the First Amendment considerations?

I do not think that my colleagues who prefer not to have this inquiry would claim that they already know the answers to all these questions. Instead, I understand them to be concerned that we not repeat what the FTC is reportedly already doing. However, there is nothing pending at the FTC that would answer any of the above questions. There is no other agency of government and no committee of Congress that is now aspiring to answer these questions. Yet no one would consider them insignificant, and many demand that they be answered. So how can anyone justify our failure to pursue answers, in an open and public proceeding?

As the United States Attorney General Reno pointed out, the FCC serves a "unique role in ensuring that the public interest is not undermined by certain uses of the public airwaves." What agency is better suited to get the facts and report to the public about this new use of the public airwaves?

Moreover, according to the press, the FTC document request is reported to be focussed specifically on the ads of a few companies. And it is a nonpublic law enforcement investigation, and is therefore closed to public view and cannot provide interested parties with an opportunity to participate. This is no broad FTC fact-gathering of the kind that would allow the public to evaluate the scope of the problem and to participate by providing their own views and proposed solutions.

The fact that the Attorney General, our nation's chief law enforcement official, has urged the FCC to act, is an overwhelming indication that the FCC has authority here. Nevertheless, in order to be perfectly fair to all points of view, the proposed NOI even raised the issue of jurisdiction and requested comment regarding the proper roles of the FCC and the FTC. Yet even this is not a matter on which my two colleagues or the hard liquor industry wish a public record to be made. Why not?

Finally, in excusing their belief that the FCC should stand by as hard liquor takes its place on the tube next to breakfast cereal and toothpaste, some have taken comfort in the fact that the amount of such advertising reportedly has been relatively low. But these readily comforted ones would in fact be very disturbed, I'm sure, if hard liquor advertising were poured across all broadcast TV channels at all times of day. Under such circumstances, would they still contend that the FCC should and could do nothing? Would they assert that the FCC could not even report to Congress on who is carrying the ads and when?

It's been true so far that many broadcasters have publicly stated that they will not carry hard liquor ads. However, we simply do not know how many broadcasters hold this view, or whether they intend to continue to hold the line against hard liquor ads in the future. Moreover, we should be concerned that once a few broadcasters in a market accept liquor ads, others will be forced to follow.

And one's head doesn't have to be far out of the sand to see that the liquor companies are eager to press the case for carrying these ads. According to a report in the June 2, 1997 *Wall Street Journal*, we can soon expect to see a dramatic rise in hard liquor advertising on TV. Various distillers, such as Seagram, International Distillers & Vintners, and Allied Domecq are

ready with plans to introduce or expand hard liquor television advertising campaigns for their brands.

Some make a First Amendment argument as an excuse for not supporting an inquiry by the FCC. The argument is, I believe, an assertion that the First Amendment does not permit even an inquiry into the existence of hard liquor ads on TV and the legal issues associated with such ads being carried on broadcast TV. No cases and no statutes support this argument. Recent important cases reject it flatly.

First, hard liquor advertising is *commercial* speech, which does not have the same First Amendment protection as noncommercial speech. The Supreme Court decision in *44 Liquormart* plainly did not stand for the proposition that commercial speech, much less hard liquor ads on broadcast TV, gets the highest level of First Amendment protection.

Second, the ads at issue are on the *broadcast* medium, with its special and unique treatment under the First Amendment. The relevant constitutional distinction was reiterated, again, in the Supreme Court's decision last week in *Reno v. ACLU*, striking down the Communications Decency Act. The Court there again affirmed that the broadcast medium is different from other media, in that very different protections and promotions of the public interest, through rules, are appropriate for the broadcast medium.

Third, the Supreme Court recently declined to review the Fourth's Circuit decision in *Anheuser-Busch v. Schmoke* upholding a Baltimore ordinance banning billboard ads for liquor in places where kids are likely to see them. The Court of Appeals' decision demonstrates that reasonable, narrowly tailored advertising restrictions to protect children can be constitutional. Furthermore, that ordinance dealt with billboards; broadcast would have an inferior claim to that presented by the billboard media in their losing argument in that case.

I return, however, to the core point that an informed Commission, taking public comment on matters of public concern, is what the public deserves, and that's why this inquiry should be conducted. Even those who believe that the Constitution requires that hard liquor ads should be able to run any time of day or night on broadcast TV should support this principle. (Of course, a person who argues for the First Amendment rights of hard liquor advertisers should be prepared to argue for the unconstitutionality of the Public Health Cigarette Smoking Act of 1969, which prohibits broadcast cigarette ads.) If we had a notice of inquiry, such alleged constitutional arguments could be made, on the record, in that proceeding. If we had a notice of inquiry and a public record, we could summarize that record in a report to the public. Each commissioner and all interested persons could comment. Any commissioner who believes that the law supports no rule relating to hard liquor ads on broadcast TV could so state in that report. That would be a fair, above-board, open, reasonable course of action. To vote not even to conduct an inquiry is to vote for the kind of agency that frustrates legitimate debate and denies the First Amendment value of a free exchange of views.

[[text version](#)]

July 9, 1997

Statement of Commissioner James H. Quello
In re: Proposed Notice of Inquiry on Broadcast Advertisement of Distilled Spirits

I wish to state from the outset that alcohol abuse is a devastating societal problem that merits serious government action.

Many families have experienced the tragic consequences of alcoholic addiction. Now the possible advertising of distilled hard liquor on TV poses problems and challenges to government regulation.

In this case, the government is already taking responsible action in the form of two investigations by the FTC, the agency with the expertise and the primary jurisdiction in this area. I wonder how many of the organizations requesting FCC action are aware that the government is already taking responsible action.

If it weren't for the FTC's appropriate actions, I would be willing to consider an FCC inquiry.

However, I can't understand the need for a proposed FCC inquiry with two ongoing FTC investigations.

An FCC inquiry at this time would represent a duplication of effort and an unnecessary expenditure of government resources. It would also violate the terms of an existing agreement between the FCC and FTC granting FTC jurisdiction for investigating advertising.

So the process is already working. The government is already responding responsibly. We, the FCC, should not get in the way in a matter beyond our authority and expertise.

Needless to say, the subject of distilled alcohol advertising is emotionally charged and lends itself too readily to mischaracterizations.

I applaud the networks and the great majority of broadcasters who have voluntarily refused to accept hard liquor ads. I hope the distilled spirits industry will establish responsible, voluntary guidelines.

It is significant that Senator Conrad Burns, Chairman Senate Subcommittee on Communications; Senator John Ashcroft, Chairman of Senate Consumer Affairs Subcommittee; Congressman Billy Tauzin, Chairman, House Subcommittee on Telecommunications, Trade and Consumer Protection; and, Congressman John D. Dingell, Ranking Member, House Telecommunications Committee, have all written to the FCC or FTC expressing opinions that liquor advertising is within the regulatory scope of the Federal Trade Commission, not the Federal Communications Commission.

- FCC -

Hard Liquor Advertisement:

FCC Opinions and Speeches

Statements by Chairman Reed E. Hundt:

FCC CHAIRMAN HUNDT SAYS FCC HAS JURISDICTION OVER HARD LIQUOR ADS ON TV; SAYS TV INDUSTRY SHOULD REAFFIRM VOLUNTARY BAN November 19, 1996 <http://www.fcc.gov/Speeches/Hundt/spreh650.txt>

CHAIRMAN REED HUNDT, SPEECH TO ASSOCIATION OF NATIONAL ADVERTISERS, WASHINGTON, D.C. APRIL 17, 1997 <http://www.fcc.gov/Speeches/Hundt/spreh720.html>

FCC CHAIRMAN HUNDT SAYS CHILDREN NEED PROTECTION FROM BROADCASTING OF HARD LIQUOR ADS ON TV <http://www.fcc.gov/Speeches/Hundt/spreh648.txt>

Speech by Chairman Reed E. Hundt, National Cable Television Association, New Orleans, Louisiana, "Broadcasting, Cable, and The Franchise" ---March 18, 1997 <http://www.fcc.gov/Speeches/Hundt/spreh716.html>

The Chairman's Corner --- Liquor Issues <http://www.fcc.gov/chairman.html#liquor>

Statements by Commissioner Rachelle B. Chong

FCC COMMISSIONER CHONG CALLS FOR BROADCASTER RESPONSIBILITY ON HARD LIQUOR ADVERTISING, November 15, 1996 <http://www.fcc.gov/Speeches/Chong/sprbc616.txt>

FCC COMMISSIONER CHONG CALLS FOR ADVERTISING INDUSTRY TO STEP FORWARD IN MEDIA CONTENT DEBATES http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1997/nrmc7018.html

Remarks of Commissioner Rachelle B. Chong to American Advertising Federation National Governmental Affairs Conference, Washington, D.C., "Asteroids, Responsibility and Televisions" --- March 13, 1997 <http://www.fcc.gov/Speeches/Chong/sprbc703.html>

ANY GOVERNMENT DECISION BANNING ALCOHOL ADVERTISING MUST BE WEIGHED ON A FIRST AMENDMENT SCALE, December 4, 1996 <http://www.fcc.gov/chngliqr.html>

Statements by Commissioner Susan Ness

Remarks of Commissioner Susan Ness before the Northern California Chapter Federal Communications Bar Association, "Competition, Kids, and Convergence" --- November 18, 1996 <http://www.fcc.gov/Speeches/Ness/spsn620.txt>

Competition, Kids, and Convergence: The Year Ahead, by Commissioner Susan Ness <http://www.fcc.gov/nessjour.html>

NEWS

FCC CHAIRMAN HUNDT SAYS CHILDREN NEED PROTECTION FROM BROADCASTING OF HARD LIQUOR ADS ON TV

FCC Chairman Reed Hundt today asked for public help "to guarantee that every child has reasonable protection from the media's capacity to do harm," including "ad hard liquor to an audience of children."

In a speech to the American Academy of Pediatrics in Boston, Hundt said, "Halloween is supposed to be one of the best nights of the year for kids. But in some markets there's something real to be afraid of this year. Halloween is one of the best drinking nights of the year, and to boost sales even higher, some broadcasters have carrying distilled spirits advertising for the first time in my lifetime."

Hundt said, "Would it be a good day for kids if broadcasters were to reverse a year tradition and show liquor companies' advertisements for hard liquor on broadcast the children of our country? That's what some liquor companies and broadcasters are starting to do," he said. "What do you think about that? Is that what the public wants with the public's property of the airwaves? Will you let us know at the FCC? Won't help us figure out how to think about liquor ads? The people need to decide," he said.

Hundt said, "We also need your help to guarantee that every child has reasonable protection from the media showing too much violence, or failing to help us educate. We need your help to guarantee that every child can have access to communications technology in every classroom, to guarantee that every child can learn about modern technology with modern technology."

Hundt said, "The key word that should underlie all the Commission's decisionmaking is the public interest." He said Americans want educational TV for kids from broadcast ratings of violent shows for adults to use in making informed choices; at least five the programming of new media, like satellites and digital TV set aside for public in programming, including free time for political debate; communications technology in classroom; rural health care clinics to be linked to academic hospitals; children with disabilities to be mainstreamed through modern communications technology; TV shows to be closed captioned; and heart monitors and hearing aids to be safe and to be compatible with new wireless technologies. "Every one of these wants, needs, demands and expectations American people have for the communications revolution is reasonable, affordable and achievable if Congress and the FCC make the right decisions and we write the right rules."

- FCC -

SPEECH BY REED HUNDT
CHAIRMAN
FEDERAL COMMUNICATIONS COMMISSION
AMERICAN ACADEMY OF PEDIATRICS
BOSTON, MA
OCTOBER 28, 1996

(AS PREPARED FOR DELIVERY)

Making Tomorrow A Better Day for Our Children

I'm honored to be with you who have devoted your careers to improving the health and well-being of our children. I especially appreciate the concern you have shown making this month Child Health Month. I'm grateful also that you care about both the physical and mental health of our children.

As a parent and as the chairman of the FCC, I'm aware that you have long recognized that popular culture is one of the greatest influences on the physical and psychological condition of children. The impact of popular culture on kids is, of course, at the

job description.

Since being confirmed to my marvelous job three years ago, I have learned a great deal from the A's and the P's: the American Psychology Association, and the American Psychiatric Association, the American Academy of Pediatrics, and then what I call the Advocates and Persuaders from the business community. In the last category I refer to 100,000 lawyers and lobbyists for the private sector who ply their trade in Washington are days when I think all 100,000 work in the communications area.

Not everyone who talks to me is always in agreement with everyone else. Sometimes I think FCC stands for Fueling Controversy in Communications.

But it has been terrifically important to open up the Commission's processes and policy debates to all Americans. Whether the example is our internet page with thousands of hits per day, or our new free long distance number - 1-888-call-FCC, or the fact that I am the first chairman in history to speak to this group, I am proud that at the FCC we have new ways to be open and responsive to the American public.

The key word that should underlie all the Commission's decisionmaking is public interest. Every commissioner, every staff member, should ask with respect to every day and we make literally thousands a year -- what is in the public interest? What do the American people want and need from us?

Let me tell what I've heard and learned and understand about the public interest. We have learned that the public interest consists of two things: first, opening closed competition at home and abroad; and second, guaranteeing that all Americans benefit from the communications revolution both by enjoying the fruits of competition -- lower prices and more choices -- and by getting access to communications technology that the marketplace might not readily deliver.

So Americans want educational TV for kids from broadcasters. We want ratings for violent shows for adults to use in making informed choices.

And Americans want at least five percent of the programming of the new media, including satellites and digital TV, set aside for public interest programming, including free political debate.

And we want communications technology in every classroom.

And Americans want rural health care clinics to be linked to academic hospitals.

And we want every pediatrician in every part of the US to be on a communication network, for a very low price, that will permit them to work and consult and heal to

Americans want children with disabilities to be mainstreamed through modern communications technology. We want the blind to be able to talk to voice recognition computers connected to the internet, and the deaf to have access to telecommunication service so they can make phone calls to anyone else.

Americans want TV shows to be closed captioned.

And we want heart monitors and hearing aids to be safe and to be compatible with new wireless technologies.

And do we want liquor ads on TV for the first time ever? The people need to decide.

We want a small but smart, responsible and responsive government.

Every one of these wants and needs and demands and expectations the American people have for the great communications revolution is reasonable, affordable and achievable if Congress and the FCC make the right decisions and we write the right rules.

Now since I've been at the FCC we have been more deregulatory and market-oriented than ever before in our history. I am the first chairman ever to order a reduction was not pleasant but it was long overdue. And we have deregulated the long distance mobile phone markets nationally and in all the states. When state governments have to reregulate industries, we have not let them. We have yet to end the monopolies of the exchange market or break up the international telephony cartel, but we're working on

But our commitment to the other, nonmarket dimensions of the public interest has never been stronger. And that's what I want to talk to you about today.

I am especially pleased to be on your program with Congressman Ed Markey, currently ranking member of the House Telcom Subcommittee. Ed is one of the two or three most prominent communications experts in Washington and one of the smartest and bravest and finest public servants I have ever met. We are a holler away from his district, almost hear them now clamoring at about a 95% approval rating for him to go back to Washington for another two years. I can testify to his leadership and his high skill promoting the public interest.

Every one of the goals and achievements for the public interest that I listed is was directly and successfully championed by Ed Markey.

What Ed has done in his career is to help the communications revolution make every day a good day for kids.

When everyone in the house is up at 7 am, wouldn't it be a good day if there were a menu of interesting, educational TV shows for kids like my seven-year-old Sara to

When our children go off to school, wouldn't it be a good day if in their class they could enter the world of wonder that communications technology can bring them? We'd like our children in our neighborhood public schools to be in classrooms that have computers on networks with Internet access, distance learning, electronic mail, and ROMs.

When our children come home in the afternoon, it would be a good day if there were choices on broadcast TV that are safe and enriching.

Then in the evenings, when the parents get home, wouldn't it be a good day if mom and father could call the kids' homework up on the TV screen or the PC? Or could we send e-mails to the kids' teacher? Or could we use the PC to send messages to other parents in the community about the soccer games or the PTA auction. These could be key ways to participate in a child's education.

Last but not least, when you turn on the TV, you should be able to know in advance what shows are inappropriate for kids. By written notice in the TV guide, by software from networks, by means of the v-chip, you should be able to choose shows that you think are appropriate to watch, and you should be able to protect your kids from the inappropriate.

That's the way a good day for kids could be.

Now let me ask you: would it be a good day for kids if broadcasters were to renege on their fifty year tradition and show liquor companies' advertisements for hard liquor on broadcast TV to the children of our country? That's what some liquor companies and broadcast networks are starting to do. Halloween is supposed to be one of the best nights of the year for in some markets there's something real to be afraid of this year. Halloween is one of the biggest drinking nights of the year, and, to boost sales even higher, some broadcast networks started carrying distilled spirits advertising for the first time in my lifetime. What do you think about that? Is that what the public wants done with the public's property of the airwaves? Will you let us know at the FCC? Either 1-888-Call FCC or www.fcc.gov will get you in touch with us.

Communications technology can make kids days better or it can make them worse.

Everything about the good or bad day for kids that I've laid out for you is part of what Congress has asked your Federal Communications Commission to take care of. We can't do our jobs without help from Congressmen like Ed Markey. But he'd be the first to say: we in public office can do our jobs without your help.

No one in the country knows more about what makes the world a better place for than you do.

We need your advice and we need your advocacy.

For example, in August, the FCC achieved something that many thought impossible. We voted unanimously for guidelines calling for a minimum of three hours a week of educational programming for children. This was the first time in the history of the FCC that we passed a rule that asks for a quantified and specific amount of educational programming. You can't get it, if you don't ask.

In the new telcom law there is the v-chip provision. This is the first law ever directly with the problem of violence in the media.

The other day I was given a copy of this book, Physician Guide to Media Violence, from my Chief of Staff, whose wife, Dr. Patti Friedman, is a pediatrician. The book says "there is an established body of evidence documenting the troubling behavioral effects of repeated exposure to media." This book, published by the American Medical Association, demonstrates that our medical community is in the forefront of recognizing and attacking the problem of media violence. My wife, Dr. Elizabeth Katz, is a psychologist. She has similar literature from the American Psychological Association.

The medical community has long supported educational TV and the v-chip.

And the medical community knows that we got the educational TV rule and the v-chip and the other advances I mentioned earlier only after a long struggle. Washington was heavy lobbying against these changes in the status quo. There were many pressure tactics against change.

But the new rules protecting the public interest in the media passed because people asked the FCC Commissioners to do the right thing. You can't get it, if you don't ask.

Many in Washington did the asking -- President Clinton, Vice President Gore, Senator Lieberman, Congressman Markey and a majority of Congressmen signing on to his letter. Our Commissioners would not have moved if private citizens had not led the demand for better television.

From Massachusetts, the famous Peggy Charren of Action for Children's Television and from all over the country doctors and teachers and parents wrote and called and us. Thousands of citizens looked out for the public interest.

That's what it takes to make change. You can't get anything in Washington without asking for it. And when there's a lot of lobbying for the status quo and against change, there needs to be a lot of asking to make for change.

In a democracy that's not unreasonable, is it? In a democracy you can't be passive. Everyone needs to vote; everyone needs to ask government to do what needs doing but none of us can do so well acting alone. That's the definition of the purpose of government that Abraham Lincoln wrote 150 years ago and it is still true.

So what do you want us to do for the good of the country and our children?

We haven't yet seen the ratings system broadcasters are preparing. It will be on desk in weeks. Will you be involved in reviewing it? I'd like your help.

As your own Child Health Month Web page states, "repeated exposure to community or media violence can have long-lasting effects on children." Won't you put your expertise to work when we write the rules to make the v-chip work?

Won't you help us figure out how to think about liquor ads?

Here's another challenge: we have only 9% of all the classrooms in America connected to the information highway. The President said we ought to get all our children's teachers on-line by the end of the century. He called for that in the 1994 State of the Union speech and he, with the support of Ed Markey in particular, put in the new telecommunications law special provisions telling the FCC to write rules that would give access to communications technology to every child in every classroom.

Vice President Al Gore coined the term, "information highway," and long ago he articulated the vision of the schoolgirl in Carthage, Tennessee, who could go to the Congress to get the learning not available in her small town in rural America.

Every town should be that Carthage.

But we haven't translated this vision into a set of rules that will get that job done with state commissioners on recommendations on November 7. Then you and everyone else in the country have a chance to comment. Next spring we vote on the rules.

We need your help in building a coalition to do the right thing. You can't get it done, if you don't ask. We want to make our kids' days into very good days. We need help to guarantee that every child has reasonable protection from the media's capacity for harm -- whether by showing too much violence, or failing to help us educate our kids about advertising hard liquor to an audience of children. We need your help to guarantee that every child can have access to communications technology in every classroom, to guarantee that every child can learn about modern technology with modern technology.

So if the voters decide to re-elect the President and I therefore keep my job a week from Tuesday, I hope you'll be asking us for what you think is the right thing. Ask us again and again. There's no limit to the number of times I'd like to hear from you and there's no limit to the number of times the Commission will try to do the right thing with your help.

- FCC -

[[Text Version](#)]

CHAIRMAN REED HUNDT
FEDERAL COMMUNICATIONS COMMISSION

ASSOCIATION OF NATIONAL ADVERTISERS
Washington, D.C.

April 17, 1997
(As prepared for delivery)

Roberto Goizueta of Coca Cola told me that the secret of his success is "early to bed, early to rise, and advertise, advertise, advertise."

Is that applicable to every product and every industry?

Would it work for the FCC?

Intel figured out how to make a brand out of a product that no consumer should ever want to see, touch, feel, smell, or know anything about: a chip inside a box.

If you can sell something like that, could you make a government agency truly popular?

I have read that "Advertisers control what's on TV."

If this is true, could you keep it from my kids?

I told them I was responsible for Arthur and Barney....and they believe me.

I've got lots of questions today, and hope you've got answers.

At the FCC we hope we started a new industry, digital TV, by giving out over a thousand licenses for this new, digital, local, terrestrial medium a couple of weeks ago.

This new business of an encoded digital stream from local TV towers to PC's and TV's in every market can permit customization of audience by ZIP code, language, taste buds or any other data point that you think correlates with sales.

It can make a TV into an Internet gateway, and it will, if Microsoft decides to throw some money at broadcasters to persuade them to adopt a computer-friendly format for the digital feed.

And, according to Edmond Sanctis, NBC Digital Productions senior vp-general mgr., research shows that users view interactive ads as an enhancement to content, rather than a nuisance.

In his speech at the National Association of Broadcasters' Convention, Michael Jordan of Westinghouse emphasized the opportunities that DTV could bring to advertising. "Digital TV provides the opportunity to bring a far greater richness and texture to our programming ... and to our commercials ... than ever before possible. That will make the appeal to viewers and the advertising effectiveness of TV more powerful."

Let competition make it so.

We have a two-point agenda at the FCC: first, we want all our policies to support vigorous and entrepreneurial competition down all five lanes of the info highway that we deal with: broadcast, cable, wireless, wire telephony and satellites.

This competition message is being exported around the world, thanks to the World Trade Organization agreement that we helped Charlene Barshefsky strike in February.

I believe that deal will cause the worldwide advertising market will grow by leaps and bounds.

Competition is point one of our two-point program.

Point two is that, like George Soros, we know that marketplace competition doesn't give you everything that a civilized society wants. Point two is that we have to be prepared to seek and get a public interest dimension to communications businesses.

One industry that happened to be the beneficiary of major Congressional interest was the industry that received digital TV licenses: today's analog broadcasters. Immediately after we implemented Congressional intent and gave the licenses away, the broadcasters' chief lobbyist said, we have to get the government out of our business.

Timing is the secret to humor.

However, all laughing aside, the government should, as to broadcasters' or advertisers' business, fight for competition and otherwise do little.

But at the same time, government should address all public interest issues. At the same time, government, as the representative of the public, should be saying, clearly, honestly, and in a way accountable to the people, exactly what the public expects from broadcasters and those that use and support free TV, the advertisers of America.

Stipulating with broadcasters and advertisers that TV is different from all other media is where we start. This is what the Supreme Court has always said. And it is what everyone in business and society is pretty darn well aware of.

This point is relevant to the letters dated October 7 and November 5, 1996, which I received from ANA, explaining its views on hard-liquor advertising.

The ANA does not agree with me that broadcast TV should have no room for hard liquor ads -- a position shared by advertisers and hard liquor companies from 1948 until suddenly last summer.

As recently as May of 1993, Fred Meister, the head of DISCUS, bragged to the Senate Commerce Committee about how the spirits industry "has recognized its responsibility to combat alcohol abuse" with its "extraordinary record of self-regulation." He continued, "We voluntarily do not advertise on radio or television, the most modern and widespread means of brand advertising ever developed."

But suddenly last November DISCUS voluntarily decided that the most modern and widespread means of brand advertising was just what would induce more Americans, especially young Americans, to pour more hard liquor.

And since then the hard liquor industry has pushed ads onto TV stations and poured lobbying heat on any skeptics, such as myself.

The ANA letters were written to support this sad and shortsighted effort.

The letters said that the Supreme Court in a case called *44 Liquormart v. Rhode Island* determined that alcohol beverage advertising has the same First Amendment protection as any other product category.

Sorry. That case wasn't about broadcast TV and it didn't take anything away from the crucial fact that the most 'modern and widespread' medium (I'm paraphrasing the hard liquor industry) ever invented -- television -- asks for and gets special treatment from the courts.

It was broadcasters who established this principle in the Supreme Court only a couple weeks ago, persuading the Supreme Court that the right of the cable industry to control their own content could be reasonably infringed by the must carry rights of broadcasters.

One of the reasons was that broadcasting is specially favored by government is that it is a free, ubiquitous deliverer of

programming, including information, including ads in the public interest.

The other side of special rights for broadcasters is special obligations.

Broadcasters have special duties as the trustees of the airwaves to attend to public interest issues.

And one such issue is whether it is in the public interest to broadcast hard liquor ads at times of day and on shows that inevitably, knowingly, certainly will reach audiences composed in part of millions of people who cannot lawfully be sold hard liquor: kids.

And in any event, even outside of TV, the law recognizes that liquor ads should not be treated like Coca Cola or Buick ads.

In *Anheuser-Busch, Inc. v. Schmoke*, the Fourth Circuit said a city could ban billboards advertising booze where kids are expected to walk to school or play.

Surely this means that the First Amendment is in no way violated by a prohibition on advertising hard liquor on shows and in time slots when kids are likely to be in the audience in large numbers -- that applies, like it or not, to very late hours.

So in connection with your letter, and generally on this topic, here's my view: let's have a debate.

The ANA agrees that the Commission has the authority to take action where necessary to ensure that the broadcast spectrum is operated in accord with the public interest. And of all agencies, only the FCC has general oversight over the use of the broadcast medium, including advertising.

Hard liquor wouldn't, by the way, be the first advertised product that got the Commission's attention.

In the 1960s the Commission launched a *Notice of Proposed Rulemaking* to take a look at cigarette advertising.

The prospect of a ban on cigarette ads from the FCC motivated Congress to pass a law to this effect. If a noticed proceeding by the Commission helps the process, let's try it.

Meanwhile, a great idea was launched by Congressman Joe Kennedy. His "Just Say No" bill that would codify the distilled-industry's former voluntary code. Representative Kennedy also introduced legislation, modeled after the V-Chip legislation, that would allow broadcasters to come together to devise their own voluntary code to set standards for alcohol advertising.

Advertisers should have the same right.

You should be able to meet as a group without any legal concerns to decide why in the world you want to promote hard liquor consumption and identification among the young people of America.

As Russell Baker wrote "Some antique sense of social responsibility seems to have been at work in the liquor industry's long voluntary absence from the tube, some remnant of decency left over from an era when people thought there were a few things too shameful to do to children, even for the purpose of improving the bottom line."

A remnant of decency, too shameful to do to children -- these are phrases worth debating in your industry: if it takes a law to encourage your discussions about these values, I'm all for it.

On April 1, the President wrote to me to ask that the Commission take all appropriate actions to explore the effects of hard-liquor advertising, particularly on kids, and to consider the possible actions that the Commission could take to support parents and kids.

I believe that the first right response to the President is for the Commission to launch a *Notice of Inquiry*. We don't even have a clear idea of how many stations are running these ads. A *Notice of Inquiry* would allow us to hear from everyone and to get the facts we need.

Some don't think this is a good idea. The ANA has said that it opposes Administration efforts to have the FCC look at liquor ads on television. Don't you want to debate the facts?

How many stations carry these ads? When are they on? Is there anything to the notion that hard liquor ads are no less dangerous than beer ads, even though beer is less than a sixth the alcohol content by volume? Don't you agree that in a free society government should be an open forum for factfinding and debate of public issues?

Sometimes the public interest turns on what should not be on TV.

And other times the issue is what should be on TV.

Let's talk about public service announcements.

PSA's can have a tremendous impact. From "A mind is a terrible thing to waste" to "You can learn a lot from a dummy" to "Friends don't let friends drive drunk," they have entered into our popular language.

Each of these ads has had an enormous impact on public behavior and safety.

Because of the good that PSA's can do, it's important that they remain a robust presence on the public airwaves.

But the statistics I've seen show that the amount of time in prime-time devoted by networks to PSA's, already quite brief, is dropping, while the time devoted to network promotion is escalating.

I'm focussing on network prime-time because that's where the eyeballs are. I know that local stations also run PSA's -- which is terrific. I just received a letter from the CBS affiliate in Omaha -- they did a terrific job on a PSA effort in that market and they were justly praised by their Governor, my friend Ben Nelson.

But as all of you know better than I, if you want your message to reach a big number of viewers, you have to think big. If PSA's are to have the wide impact we want them to have, they need to be placed in network prime-time.

The drying up of network PSA's is occurring even as "clutter" is increasing.

According to the Commercial Monitoring Report, put together by this group, ANA, and the Four A's, clutter -- everything that isn't the program itself -- reached a new high last year.

Clutter accounted for a fourth to a third of all network TV time during all parts of the broadcast day in 1996. In prime time on the four biggest networks, the average hour contained 15 minutes and 21 seconds of clutter.

This is welcome to the viewer, I think, only during the second half of the Super Bowl.

At the same time, the latest report shows that PSA time has dropped to 5 seconds per network per hour of prime time, down from 12 seconds just three years ago. Five seconds in an hour, fifteen seconds a night! That's just not very much.

The public needs PSA's because the public needs the messages that they can deliver so effectively.

The FCC has never thought it necessary to impose a specific requirement to provide PSA's on broadcasters. But PSA's have been part of the service that broadcasters point to show that they are, indeed, using the public's airwaves in the public's interest.

And PSA's are good for your product advertisements, because they contribute to the creation of an environment that best showcases the ads you pay for.

There's another trend that has been spotted in local markets: sponsorship. That's when a local organization pays to "sponsor" a PSA.

There is nothing wrong with a private organization sponsoring an ad.

But if broadcasters are charging for the ads, it's hard to accept the argument that the PSA's are part of what they provide to

the public in return for the free use of the spectrum.

And networks have begun to show spots in which the star of a network show will deliver a positive message to the audience. This is great for business, not bad for the public, and also not a public service announcement.

The broadcasters themselves have always imposed very stringent requirements on PSA's, and these have been welcomed and used by advertisers to make very, very effective campaigns.

For example, networks require that the nonpaying sponsor be a 501(c)(3) or a government agency. They look very carefully to be sure that the PSA's are nonpartisan, nonsectarian, not designed to influence specific legislation -- and noncommercial.

The networks also give preferences to PSA's that provide a means for "fulfillment," or follow-through, with a knowledgeable organization -- for example, a PSA that gives a phone number for viewers to get more information.

Another important aspect of traditional PSA's is that they are heavily researched to get at the real attitudinal barriers that might keep the ads having the greatest possible effect.

For example, the "Friends don't let friends drive drunk" ad made an important breakthrough. Advertisers taught us all that it was more effective to educate those who could intervene in a dangerous situation, rather than focus on the horrors of drunk driving.

So advertisers saved lives in this country by shifting the message to friends and to their own behavior, and away from the rationalizing drinkers.

And anti-smoking ads directed at invincible, immortal teenagers just won't work very well if they emphasize lung cancer. To be effective, they take a different approach. For example, in California, ads use teenagers' worries about social disapproval -- one ad shows the result when a girlfriend absent-mindedly takes a sip from a can that her boyfriend has been using as a tobacco juice spittoon.

In Arizona, the ads play off teenagers' anger at manipulation by the media -- by showing teens being driven into a corral by the Marlboro Man or showing them in a playground being rained on by cigarettes.

Thanks to advertisers, PSA's have been the oil and canvas with which you have created wonderful, memorable, important, lifesaving messages.

You have done so much for the country with PSA's. Many of you here serve on the Ad Council.

Won't you help me make sure you still have the opportunity to do this good in the future?

Alex Kroll, the Chairman of the Ad Council, has made a terrific proposal. He has asked for just one second each night, in prime time, for every million kids in the United States. One second for one million. That adds up to 60 seconds a night, in prime time. After all, 12 minutes are devoted each night to promos for network shows. Couldn't one of those 12 minutes be devoted to a PSA? Wouldn't that be a small price to pay for the use of the public spectrum -- particularly after the broadcasters have received the free use of an additional 6 MHz of spectrum for the conversion to DTV?

A big, new exciting version of PSA's is the new interest in free broadcast ad time by candidates for public office.

Why should a public servant's time be consumed by chasing down money to pay to get onto public property -- the airwaves -- to reach the voters? President Clinton and others, including Senator John McCain, Barry Diller, Walter Cronkite, Paul Taylor, and others have all suggested that broadcasters renew their public interest commitment by providing substantial amounts of air time for direct access by candidates to voters.

Just the other day I received a letter from 13 Members of Congress urging the Commission to take steps to improve "our troubled system of financing elections." "The FCC could vastly improve political debate and reduce the cost of elections by offering an incentive to broadcasters to provide candidates with free air time during elections." These Members asked that the DTV licenses be conditioned on the provision of free air time.

I agree.

And the Commission will soon issue a *Notice* to consider the public-interest obligations that accompany the DTV licenses, and free time for candidates is one of the most important proposals we will consider.

Free time can relieve the enormous fundraising pressure that is such a burden on our political process, and at the same time, can foster more political speech. All this, in return for what is really a tiny percentage of the total advertising time a station will air in the course of two years. Given that the broadcasters get to make private use of their licenses for free, this return seems little enough to expect. Other industries devote resources to serving the public interest; for example, DBS must give 4-7% of its channel capacity to noncommercial educational and informational programming, and similarly, cable must give carriage to PEG channels. Broadcasters, too, should have concrete, clear guidelines about what they must provide to the public in return for the use of the public spectrum.

I'm telling you something that you know already: television works, advertising works.

This group has an enormous influence over television and what goes on it. I hope you will think about using that influence to make sure that television does everything that it can, and everything it should, and nothing that it shouldn't.

- FCC -

Advertising Alcohol and the First Amendment

Prepared Remarks of
Roscoe B. Starek, III, Commissioner
Federal Trade Commission

presented before the
American Bar Association
Section of Administrative Law and Regulatory Practice Committee
on Beverage Alcohol Practice

San Francisco, California

August 4, 1997

Good afternoon. I'm pleased to have the opportunity to talk with you about alcoholic beverage advertising and the Federal Trade Commission.⁽¹⁾ Since many of you are probably not familiar with the Commission and its law enforcement powers, I'll provide a brief introduction in the context of current concerns about alcohol advertising that, by placement or content, may appear to be directed to minors.

Deception and Unfairness Authority

Section 5 of the Federal Trade Commission Act ("FTC Act") prohibits both unfair and deceptive acts or practices in or affecting commerce.⁽²⁾ The FTC's deception standard is set forth in the Commission's Deception Policy Statement.⁽³⁾ It asks whether the challenged representation or practice would likely deceive a consumer acting reasonably under the circumstances in a material way -- that is, in a way that affects the consumer's conduct or choice regarding a product or service. In assessing advertising or other marketing practices that affect or are directed primarily to a particular audience, the Commission considers the effect of the ad or practice on that audience.⁽⁴⁾ Thus, when we look at the impact of advertising on children, we consider the limited ability of children to detect exaggerated or untrue statements.⁽⁵⁾ It is possible that a child might reasonably interpret an ad in a way that an adult would not. Claims tend to be taken literally by young children. For example, an ad showing a toy ballerina standing alone and twirling may reasonably be understood by children to mean that the ballerina can really dance by herself.⁽⁶⁾

Under the FTC Act, we can also challenge unfair acts and practices -- those that cause or are likely to cause substantial injury to consumers, when that injury is not reasonably avoidable by the consumers themselves and is not outweighed by countervailing benefits to consumers or competition.⁽⁷⁾ Although injury must be both substantial and likely, unwarranted health or safety risks can suffice. For example, the distribution of free sample razor blades without protective packaging in home-delivered newspapers poses a direct risk of injury to young children and others who might handle the papers.⁽⁸⁾

In any unfairness inquiry, the issue that is apt to be most difficult is causation. In 1994, a majority of the Commission -- including me -- decided to close an investigation of whether the R.J. Reynolds Tobacco Company had engaged in unfair practices through its use of the "Joe Camel" campaign to promote Camel cigarettes. We said then that "[a]lthough it may seem intuitive to some that the Joe Camel advertising campaign would lead more children to smoke or lead children to smoke more, the evidence to support that intuition is not there."⁽⁹⁾ As the statement said, the record did not show a link between the Joe Camel advertising campaign and increased smoking among children sufficient to justify a charge of unfairness in violation of the FTC Act.

Congress amended the FTC Act later that year to specify that an unfair act or practice is one that causes or is likely to cause substantial injury to consumers that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or competition.⁽¹⁰⁾ Essentially, Congress codified the Commission's injury test for unfairness as set forth in the Unfairness Policy Statement.⁽¹¹⁾ At the same time, Congress expressly barred the Commission from relying on public policy considerations as the primary basis for an unfairness determination.⁽¹²⁾

The Commission still alleges deception far more frequently than unfairness, but we recently pursued unfairness allegations in several cases.⁽¹³⁾ I supported all of them, except for issuance of a revised complaint against R.J. Reynolds alleging that the Joe Camel advertising campaign is unfair. I voted against that complaint because the evidence, including new evidence not before the Commission in 1994, did not give me reason to believe that there is a likely causal connection between the Joe Camel campaign and smoking by children. I also stated that it is not in the public interest for the Commission to expend its scarce resources on this litigation while other developments might largely duplicate any remedies the Commission might obtain.

It would be a mistake to underestimate the possibility of additional unfairness enforcement actions by the Commission, including possible enforcement against alcohol advertising that may appear, by placement or content, to be targeted to children. I want to emphasize that the Commission is applying the codified injury requirement with scrupulous care. Of course, in any particular case individual Commissioners may disagree as to the level of evidence needed to satisfy the requirement that an alleged unfair act or practice "causes or is likely to cause substantial injury."

Remedies

The Commission has a variety of tools available to attempt to prevent future harm to consumers, including law enforcement actions in federal court or before an administrative law judge, rules or guidelines, and consumer education. Court or administrative orders sought by the Commission prohibit deceptive or unfair claims and almost always impose "fencing-in" relief that covers claims or products beyond those that were the subject of the complaint. In appropriate cases, disclosures may be required to correct or prevent deception. Corrective advertising is warranted in the rare case in which the challenged ads substantially contributed to the development and maintenance of a false belief that lingers in the minds of a substantial portion of consumers.⁽¹⁴⁾

The Commission also may seek redress for consumers or disgorgement in cases involving dishonest or fraudulent conduct. For instance, a Commission consent order issued last year required a toy manufacturer to refund to consumers the purchase price of toy vehicles deceptively shown in television ads performing such feats as driving and flying under their own power.⁽¹⁵⁾ In fact, the toys did not have these capabilities and were manipulated off-screen with wires and other hidden devices to make them appear to be moving. As fencing-in relief, the Commission also required the company to send a letter to every television station that aired the commercials, advising them of the settlement and of the availability of self-regulatory guidelines used by many industry members to screen advertising directed to children. Once a Commission order is in effect, violations of the order may result in the imposition of civil penalties.

Alcohol Advertising Issues

As you all know, last year the Distilled Spirits Council of the United States ended its forty-year voluntary ban on liquor advertising on radio and television, precipitating a public debate about the effect of alcohol advertising on children. In response, the Chairman of the Federal Communications Commission sought to hold hearings to inquire into whether the broadcast of distilled spirits advertising is in the public interest. The inquiry was scuttled when two of the four members of the FCC refused to support the Chairman's initiative because they believe that a memorandum of understanding between the FCC and the FTC places this issue within the FTC's jurisdiction.

As a Commissioner of the FTC, I would not presume to opine on the FCC's jurisdiction. I am confident, however, that the Federal Trade Commission has jurisdiction over deceptive or unfair advertising for alcoholic beverages and that we will exercise that jurisdiction in appropriate cases.⁽¹⁶⁾ For example, in 1991 the Commission issued a consent order against the Canandaigua Wine Company for alleged deceptive marketing of Cisco, a fortified, flavored wine product.⁽¹⁷⁾ The Commission charged that Cisco's packaging and advertising misrepresented that it was a low-alcohol wine cooler, despite a high alcohol content. The alleged misrepresentation resulted in alcohol poisoning of several consumers who believed the product to be low in alcohol. The order prohibited representations that Cisco is a low-alcohol, single-serving product and required other changes in marketing and packaging to distinguish the product more clearly from wine coolers.

Use of the Commission's unfairness jurisdiction to address alcoholic beverage advertising that may appear to be targeted to children requires showing that the advertising causes or is likely to cause substantial injury. It may seem obvious and noncontroversial to some that an increase in distilled spirits advertising and promotional efforts will lead to increased consumption of this product. Firms spend a lot of money on advertising -- why else would they do it? But there are two important issues to keep in mind.

First, advertising and promotions frequently are undertaken simply to induce consumers to switch from one brand to another.⁽¹⁸⁾ When this occurs, there may be little or no net increase in total consumption, because one brand's gain is another's loss.

Second, much of this advertising is also undertaken to differentiate one brand from another -- to convince consumers that rival products are actually poor substitutes for the advertised brand. To the extent that firms in a market can successfully differentiate their products, price competition between rival brands may actually decrease, allowing each brand to raise its price. Although each firm may actually sell less than if no firms had advertised, the ability to raise prices makes this strategy profitable. Thus, an increase in brand advertising could actually result in lower overall consumption, especially by underage consumers who are likely to be particularly sensitive to price increases.⁽¹⁹⁾

The Commission testified to Congress in 1990 that the evidence of a link between advertising and alcohol consumption in general was inconclusive and failed to show a causal relationship.⁽²⁰⁾ The Commission suggested that these studies and their underlying research methodology were perhaps incapable of accurately measuring any relationship that might exist. At that time, we called for further research. Just two years ago, the National Institute of Alcohol Abuse and Alcoholism issued a similar call based on a review of existing studies of the effects of alcohol advertising, promotion activities, and mass media presentations on attitudes toward drinking, actual consumption, and alcohol-related problems. According to this government agency, existing studies were inconclusive for methodological reasons and the lack of sufficient data.⁽²¹⁾

In my view, methodologically sound studies are the best way to determine whether and how alcohol advertising affects consumption. But the absence of reliable scientific evidence on the effect of a particular advertising campaign on consumption is not dispositive of every unfairness inquiry. Section 5 permits us to find that a practice is unfair if it is **likely** to cause substantial injury; we need not find that injury actually occurred. We look at the entire record and consider the flaws or limitations of every piece of evidence in assessing how much weight it deserves. Direct or circumstantial evidence of an intent to target children with advertising for a product they cannot legally consume is particularly relevant to this inquiry.

The Commission has looked at placement and content issues in the context of our 900-Number Rule. Shortly after I arrived at the Commission, we accepted several consent agreements settling allegations that advertisements for 900-number calls unfairly induced children to make calls to cartoon characters, resulting in expensive phone bills that their parents had no reasonable way to avoid.⁽²²⁾ The Commission required easy-to-understand disclosures and that parents be provided either with a reasonable means to avoid unauthorized calls or with one-time refunds for unauthorized calls by children.

Congress later expanded this relief with a statute, the Telephone Disclosure and Dispute Resolution Act of 1992, that directed the Commission to issue pay-per-call regulations. Among other things, the 900-Number Rule prohibits ads for non-educational, pay-per-call services directed to children under 12, requires clear and conspicuous disclosures about the need to obtain prior parental permission in ads directed to children under 18, and sets forth criteria for determining when a call is directed to a particular age group.⁽²³⁾ The Commission's Rule provides that ads are directed to a particular age group if competent and reliable evidence shows that more than 50% of the audience is composed of that age

group. If such evidence is not available, other criteria include placement of the ad on a program directed to that age group, the nature of the programming in which the ad appears, and whether the ad, regardless of its location, is directed primarily at the relevant age group in terms of its subject matter, content, tone or the like. This Rule is currently under review by the Commission, and we will seek public comment on any changes we propose later this year.

The criteria set forth in the Rule for determining when ads are directed to children should be particularly interesting to companies seeking to avoid targeting children with ads for products they cannot legally consume. Self-regulation may be the best way to address advertising of beer, wine, or spirits that may be especially appealing to or directed to minors. In light of the governmental interest in the effect of alcoholic beverage advertising on children, industry might wish to forestall possible "fix-it-for-you" solutions by coming up with its own fix through industry codes and self-regulatory enforcement mechanisms.

The First Amendment

By now, you may be wondering where the First Amendment comes in. Well, in my view, the First Amendment needs to be considered when we assess appropriate remedies for unfair or deceptive practices and when we select cases for enforcement, so that our enforcement actions do not have the effect of chilling truthful, non-deceptive speech. Alcohol advertising poses particularly difficult First Amendment issues because this advertising concerns behavior that is legal when engaged in by adults.

As the Supreme Court recently reaffirmed in *44 Liquormart, Central Hudson*⁽²⁴⁾ remains the standard for assessing whether restrictions on commercial speech are permissible under the First Amendment.⁽²⁵⁾ Under the *Central Hudson* standard for commercial speech, neither deceptive speech nor speech that proposes an illegal transaction is protected by the First Amendment.⁽²⁶⁾ A restriction on commercial speech that is not misleading and concerns lawful activity must pass three additional tests: the asserted governmental interest in the speech restriction must be substantial; the restriction must directly advance the governmental interest asserted; and the restriction must not be more extensive than necessary to serve that interest.⁽²⁷⁾

Commission orders that require marketers to stop making false or unsubstantiated statements do not tread on First Amendment rights. When the Commission compels speech as part of a remedy for deception, however, the analysis becomes more complicated. Disclosures that remedy deceptive omissions of material information are correctly viewed as restraints on deceptive speech. Corrective advertising or affirmative disclosures that prevent future deception or correct past deception do not raise First Amendment concerns, unless they in fact go beyond the prevention or correction of deception.⁽²⁸⁾ Broad fencing-in remedies, for example, that compel general consumer education or other speech not directly related to the prevention of deception are unlikely to survive First Amendment scrutiny.

Restrictions on unfair advertising also are subject to First Amendment scrutiny under the *Central Hudson* standard. In *44 Liquormart*, a plurality opinion written by Justice Stevens

confirmed that, in the absence of evidence, courts cannot assume that an advertising restraint will significantly reduce consumption.⁽²⁹⁾ Instead, the government must establish a causal relationship between its speech restriction and the asserted state interest that the restriction is intended to directly advance.⁽³⁰⁾ The Court found that its earlier decision in *Posadas*⁽³¹⁾ -- a case that involved a ban on advertising casino gambling -- gave too much deference to the legislature when assessing whether a speech restriction directly advances the asserted governmental interest.⁽³²⁾

In *44 Liquormart*, the Court struck down under the First Amendment a legislative ban on price advertising of alcoholic beverages. The Stevens plurality reasoned that the ban did not significantly advance the asserted governmental interest and was not narrowly tailored. Both the plurality opinion and Justice O'Connor's concurring opinion in *44 Liquormart* agreed that a total ban on price advertising of alcohol -- when there were other effective ways for government to achieve its goal -- failed to satisfy the *Central Hudson* requirement that a speech restriction not be more extensive than necessary.

However, *44 Liquormart* could also be read to leave open the possibility that even without evidence that the advertising restriction directly advances the government's interest, the Court could defer to the government's judgment when the restriction concerns advertising about unlawful behavior.⁽³³⁾ Because alcohol advertising directed to children promotes unlawful behavior, deference to a legislative judgment according to this reasoning may be warranted.

Following *44 Liquormart*, the Supreme Court vacated and remanded the Fourth Circuit's two decisions upholding district court rulings against First Amendment challenges to a Baltimore city ordinance banning stationary outdoor advertising of alcoholic beverages in certain areas where children were likely to walk to school or play.⁽³⁴⁾ These cases, often referred to as the "Baltimore billboard cases," raise more questions than they answer about how *44 Liquormart* applies to restrictions on alcohol advertising that might affect children. The district court reached its decisions by relying on *Posadas* and deferring to the Baltimore City Council's legislative record and findings. On remand following *44 Liquormart*, the Fourth Circuit stated that it did not continue to rely on *Posadas* or "defer blindly to the legislative rationale," but rather reached its conclusion based on its independent assessment of the fit between the City Council's objective and the regulation used to achieve it.⁽³⁵⁾ Judge Butzner dissented, stating that the district court decisions should have been vacated and the cases remanded for evidentiary hearings in light of *44 Liquormart*. The Supreme Court denied certiorari of the Fourth Circuit's decisions on remand, so the issue has not been joined. My view is that without evidence that a restriction on alcohol advertising will significantly reduce consumption by minors, the speech restriction should not survive First Amendment scrutiny.

Conclusion

How does the First Amendment apply to the Commission's consideration of alcohol advertising? It requires us to take a hard look at evidence of causation in unfairness cases that may involve restrictions on advertising. Beyond that, when a remedy implicates First Amendment rights, the Commission -- as a government agency acting in the public

interest -- should resist the temptation to compel speech through negotiation that it has no colorable chance of obtaining in litigation. As I have stated on several occasions, the Commission should seek relief that is no more extensive than necessary to prevent future violations by a Commission respondent.⁽³⁶⁾ We must not impose relief that has the potential to chill truthful and non-deceptive advertising or to deprive consumers of useful information.

Finally, I would like to emphasize that the natural complement of government restraint is self-regulation -- to the extent permitted by the antitrust laws, of course. Alcoholic beverage advertising that is targeted to or may affect children presents critical public policy concerns that should be addressed first through industry self-regulation. Only when the market fails should the government resort to narrowly tailored action consistent with the First Amendment.

Endnotes:

1. The views that I express here today are my own, and do not necessarily reflect those of the Commission or any other Commissioner.
2. 15 U.S.C. 45(a).
3. Letter from the Federal Trade Commission to Hon. John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), reprinted in *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 174 (1984).
4. Deception Policy Statement at 178-79.
5. See *Ideal Toy*, 64 F.T.C. 297, 310 (1964).
6. See *Lewis Galoob Toys, Inc.*, 114 F.T.C. 187 (1991).
7. 15 U.S.C. 45(n).
8. See *Philip Morris, Inc.*, 82 F.T.C. 16 (1973).
9. *R.J. Reynolds Tobacco Co.*, File No. 932-3162 (Joint Statement of Commissioners Mary L. Azcuenaga, Deborah K. Owen, and Roscoe B. Starek, III) (June 6, 1994).
10. 15 U.S.C. 45(n).
11. See Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate (Dec. 17, 1980) ("Unfairness Policy Statement"), appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984).
12. 15 U.S.C. 45(n).
13. *Sears, Roebuck and Co.*, File No. 972-3187 (consent agreement accepted for public comment) (June 3, 1997) (unlawful collection of debts that were legally discharged in bankruptcy proceedings); *FTC v. David L. Amkraut*, Civ. 97-054-RSWL(BQRx) (C.D. Cal. 1997) (submitting disqualifying, multiple entries on behalf of his clients in State Department's green card lottery; failing timely to forward to lottery winners the materials necessary for them to apply for visas); *FTC v. Diversified Marketing Service Corp.*, Civ. 96-0388M (W.D. Okla. 1996) (unauthorized bank debits and credit card charges); *FTC v. Windward Marketing, Ltd.*, 1:96-CV-615-FMH (N.D. Ga. 1996) (same). See also *R.J. Reynolds Tobacco Co.*, Docket No. 9285 (complaint issued May 28, 1997) (allegedly inducing children to smoke or continue

smoking through advertising campaign).

14. See *Warner Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

15. *Azrak-Hamway International, Inc.*, Docket No. C-3653 (1996).

16. The Commission shares jurisdiction with the Bureau of Alcohol, Tobacco and Firearms ("BATF") over deceptive alcohol advertising. The Federal Alcohol Administration Act authorizes the BATF to prevent false, misleading, obscene, or indecent statements in advertisements of distilled spirits, wine, or malt beverages. 27 U.S.C. 205(f). BATF also has authority over alcohol product labeling and pre-approves package labels. 27 U.S.C. 205(e).

An agreement between the FTC and the FCC recognizes that the FTC has primary responsibility with respect to unfair or deceptive advertising in all media, including the broadcast media. Liaison Agreement Between Federal Communications Commission and Federal Trade Commission (Apr. 27, 1972), 4 Trade Reg. Rep. (CCH) 9852.

17. *Canandaigua Wine Co.*, 114 F.T.C. 349 (1991).

18. J. Fisher, Advertising, Alcohol Consumption, and Abuse: A Worldwide Survey 24 (1993).

19. The proposition that product differentiation may give firms the power to raise price and reduce output is discussed in 2.21 of the federal antitrust enforcement agencies' 1992 horizontal merger guidelines. U.S. Dept. of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) 13,104, at 20,573-8.

20. *Health Warnings on Alcoholic Beverage Advertisements: Hearings on H.R. 4493 Before the Subcomm. on Transportation and Hazardous Materials of the Committee on Energy and Commerce, United States House of Representatives*, 101st Cong., 2d Sess. 35-41 (1990)(statement of Janet D. Steiger, Chairman, FTC).

21. U.S. Dept. of Health and Human Services, Public Health Service, National Institutes of Health, National Institute of Alcohol Abuse and Alcoholism, *The Effects of the Mass Media on the Use and Abuse of Alcohol*, at v (1995).

22. *Phone Programs, Inc.*, 115 F.T.C. 977 (1992); *Teletel, Inc.*, 114 F.T.C. 399 (1991); *Audio Communications, Inc.*, 114 F.T.C. 414 (1991). See also *Fone Telecommunications, Inc.*, 116 F.T.C. 426 (1993).

23. 16 C.F.R. 308.3(e), (f).

24. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

25. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).

26. See *Central Hudson*, 447 U.S. at 563; *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976).

27. *Central Hudson*, 447 U.S. at 566.

28. See *Warner Lambert*, 562 F.2d at 758; *Beneficial Corp. v. FTC*, 542 F.2d 611, 620 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

29. The Court stated that "[w]ithout any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance. Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption." 44

Liquormart, 116 S. Ct. at 1509 (emphasis in original) (citations omitted).

30. "[A]ny conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." *Id.* at 1510 (citations omitted).

31. *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding legislature's decision that its interest in reducing residents' demand for legal casino gambling would be advanced by limiting casino advertising).

32. In *44 Liquormart*, the Court stated that "[t]he reasoning in *Posadas* does support the State's argument [that Rhode Island's ban on liquor price advertising would promote temperance], but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis. . . . [T]he advertising ban served to shield the State's antigambling policy from public scrutiny that more direct, nonspeech regulation would draw." 116 S. Ct. at 1511.

33. The Court distinguished the Rhode Island ban on retail price advertising of liquor, which targeted information about entirely lawful behavior, from the prohibition upheld in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), on the airing of lottery advertising by broadcasters located in states in which lotteries were illegal. 116 S. Ct. at 1510-11.

34. See *Anheuser-Busch, Inc. v. Mayor of Baltimore*, 855 F. Supp. 811 (D. Md. 1994), *aff'd*, *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996); *Penn Advertising v. Mayor of Baltimore*, 862 F. Supp. 1402 (D. Md. 1994), *aff'd*, *Penn Advertising v. Mayor & City Council of Baltimore City*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2575 (1996).

35. *Anheuser-Busch v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997). See also *Penn Advertising v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

36. See, e.g., Statement of Commissioner Roscoe B. Starek, III, Concurring in Part and Dissenting in Part in *America Online, Inc.*, File No. 952-3331 (consent agreement accepted for comment) (May 1, 1997).

"Unfairness, Internet Advertising and Innovative Remedies"

Prepared Remarks of
Commissioner Roscoe B. Starek, III

before the

American Advertising Federation Government Affairs Conference
Washington, D.C.
March 13, 1997

Thank you for the opportunity to discuss a few current issues which I suspect could cause some concern to the advertising community. This is an interesting time to be a Commissioner, and I predict that as the weather gets warmer over the next several months, some of the matters we will address will become hotter as well. Most of you follow the FTC closely, and I know you like to hear what we think about the most controversial issues that we are facing. And we are wrestling with several. So I thought I would discuss three issues today: the FTC's unfairness authority, looking specifically at alcohol and tobacco advertising; our activities concerning Internet advertising and online privacy; and our approach to innovative remedies for deceptive advertising. ⁽¹⁾

Unfairness

Everyone in this room knows that Section 5 of the Federal Trade Commission Act ("FTC Act") prohibits both unfair and deceptive acts or practices in or affecting commerce. ⁽²⁾ Everyone knows that the FTC promulgated an Unfairness Policy Statement in 1980, which we apply when we address issues raising unfairness concerns. ⁽³⁾ We all know that Congress amended the FTC Act in 1994 to specify that an unfair act or practice is one that causes or is likely to cause substantial injury to consumers that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or competition. ⁽⁴⁾ And we all know that the Commission alleges deception far more frequently than unfairness. What you may not know is that in the past year the Commission has pursued unfairness allegations in several court actions. ⁽⁵⁾

The ongoing public policy debates on tobacco and alcohol advertising have raised new questions about the relationship between advertising and underage consumption of these products. The proper role of government regulation of advertising, including the applicability of the Commission's unfairness authority, has been called into question. The last time the Commission publicly visited similar issues was in 1994, when a majority -- including me -- decided to close an investigation of whether the R.J. Reynolds Tobacco Company had engaged in unfair practices through its use of the "Joe Camel" campaign to promote Camel cigarettes. We said then that "[a]lthough it may seem intuitive to some that the Joe Camel advertising campaign would lead more children to smoke or lead children to smoke more, the evidence to support that intuition is not there." ⁽⁶⁾ As the statement said, the record did not show a link between the Joe Camel advertising campaign and increased smoking among children sufficient to justify a charge of

unfairness in violation of the FTC Act. Since then, Congress has expressly barred the Commission from relying on public policy considerations as the primary basis for an unfairness determination.⁽⁷⁾

The recent decision by the Distilled Spirits Council of the United States ("DISCUS") to end its forty-year voluntary ban on liquor advertising on radio and television suggests that the Commission may again find itself weighing in on the relationship between advertising and underage consumption. Although DISCUS's action has precipitated this debate, there really is no basis to distinguish the concerns raised by distilled spirits advertising from those raised by advertising of other types of alcoholic beverages.

The Commission testified to Congress in 1990 that the evidence of a link between advertising and alcohol consumption was inconclusive and failed to show that a causal relationship did or did not exist.⁽⁸⁾ The Commission suggested that these studies and their underlying research methodology were perhaps incapable of accurately measuring any relationship that might exist. At that time, we called for further research. Two years ago, the National Institute of Alcohol Abuse and Alcoholism ("NIAA") issued a similar call based on a review of existing studies of the effects of alcohol advertising, promotion activities, and mass media presentations on attitudes toward drinking, actual consumption, and alcohol-related problems. According to NIAA, existing studies were inconclusive for methodological reasons and the lack of sufficient data.⁽⁹⁾

Of course, all members of the Commission would be deeply concerned about ads for alcohol or tobacco directed at children. Concern, however, is not in itself sufficient for the Commission to initiate an enforcement action based on our unfairness authority. Even if alcohol or tobacco advertising appears to be targeted at an underage audience, the Commission cannot act unless it determines that there is reason to believe that the advertising is likely to cause substantial injury. If intuition and concern for children's health were enough, we would have already acted.

It may seem obvious and noncontroversial to some that an increase in advertising and promotional efforts by a manufacturer will lead to increased consumption of its product. Firms spend a lot of money on advertising -- why else would they do it? But there are two important issues to keep in mind.

First, advertising and promotions frequently are undertaken simply to induce consumers to switch from one brand to another.⁽¹⁰⁾ When this occurs, there may be little or no net increase in total consumption, because one brand's gain is another's loss.

Second, much of this advertising is also undertaken to differentiate one brand from another -- to convince consumers that rival products are actually poor substitutes for the advertised brand. To the extent that firms in a market can successfully differentiate their products, price competition between rival brands may actually decrease, allowing each brand to raise its price. Although each firm may actually sell less than if no firms had advertised, the ability to raise prices makes this strategy profitable. Thus, an increase in brand advertising could actually result in lower overall consumption, especially by underage consumers who are likely to be particularly sensitive to price increases.⁽¹¹⁾

Methodologically sound studies are the best way to determine whether a particular ad campaign for a particular product causes consumers to switch brands, attracts consumers who have not used the product before, increases consumption by existing consumers, or results in some combination of these effects. Without these studies, it is difficult to determine the real relationship between alcohol or tobacco advertising and underage consumption.

Nonetheless, the absence of conclusive scientific evidence on the effect of a particular advertising campaign on consumption is not dispositive of every unfairness inquiry. The unfairness standard requires us to find that substantial injury is **likely**, not that it has actually occurred. We look at the entire record and consider the flaws or limitations of every piece of evidence in assessing how much weight it deserves and, ultimately, whether a preponderance of the evidence indicates that an ad campaign is unfair.

The most recent Supreme Court decision regarding whether restraints on alcohol advertising survive First Amendment scrutiny⁽¹²⁾ indicates that Court's unwillingness to rely on anything other than the evidence when considering the relationship between advertising and consumption. In *44 Liquormart*, a plurality opinion confirmed that, in the absence of evidence, courts cannot assume that an advertising restraint will significantly reduce consumption.⁽¹³⁾ Instead, the government must establish a causal relationship between its speech restriction and the asserted state interest that the restriction is intended to directly advance.⁽¹⁴⁾ The Court also found that its earlier decision in *Posadas* -- a case which involved a ban on advertising casino gambling⁽¹⁵⁾ -- gave too much deference to the legislature when assessing whether a speech restriction directly advances the asserted governmental interest.⁽¹⁶⁾

However, *44 Liquormart* could also be read to leave open the possibility that even without evidence that the advertising restriction directly advances the government's interest, the Court could defer to the government's judgment when the restriction concerns advertising about unlawful behavior.⁽¹⁷⁾ Because alcohol or tobacco advertising directed to children promotes unlawful behavior, deference to a legislative judgment according to this reasoning **may** be warranted.

The difficulty, of course, is that when it is directed to adults, alcohol or tobacco advertising concerns legal behavior. Without evidence that a restriction on this advertising will significantly reduce consumption by minors, the speech restriction may not survive First Amendment scrutiny.⁽¹⁸⁾

Advertising and Marketing on the Internet

Section 5 of the FTC Act applies to online commerce -- a medium that may present problems and opportunities not found in other media. The Commission has worked hard to educate itself about the Internet and online services in order to assess the implications for its consumer protection mission. The ease with which consumers can surf the Web also enables law enforcers to seek out potentially deceptive online advertisements. Commission staff regularly monitor the Internet and online services, and some of our

investigations have come about as the result of online solicitations received or found by our staff.

Our online cases so far have involved fraud, including credit repair schemes, business opportunities, and pyramid scams. Just last month, the Commission obtained a temporary restraining order, followed by a stipulated preliminary injunction, shutting down a scam that relied on online technology to work. Ads on the Internet enticed consumers to download a program to view the defendants' "adult entertainment" Web sites that -- without the consumers' knowledge -- disconnected their computers from their own local Internet service providers and reconnected the computers to a phone number in Moldova.⁽¹⁹⁾ Even after consumers who downloaded this program left the defendants' Web sites, their computers remained connected to the international long distance number until the consumers turned off their computers. The defendants failed adequately to disclose that consumers would be billed for an international long distance call to Moldova or that they had to turn off their computers to end the call. As more advertising occurs online, you can expect to see a more active FTC role with respect to non-fraudulent advertising.

The Commission also is actively examining online advertising to assess the implications for consumers' privacy interests. Last June, the Commission hosted a workshop on online privacy issues in which your organization participated. Consistent with its usual market-oriented approach, the Commission is looking first to businesses to address privacy issues through voluntary measures, rather than assuming that an expanded government role is necessary. There are no plans now for the Commission to issue privacy guidelines or regulations.

We recently announced that we are hosting another privacy workshop this June. One session will gather information as part of a Commission study of the collection, compilation, sale, and use of computerized databases that contain what consumers may perceive as sensitive information. This study will address questions that arose following the highly publicized availability of sensitive information on computerized research services last fall. The remaining two sessions will gather new information -- including empirical evidence -- about online privacy generally and children's online privacy. The four-day workshop will also cover the use of unsolicited commercial E-mail. Commission staff will consider the comments filed to help determine what, if any, further action to recommend in the area of online privacy protections.

Advertising on the Internet raises complicated questions of choice of law and jurisdiction that can pose barriers to effective enforcement by governments and to effective compliance by advertisers. Legal requirements may differ depending upon the country in which a consumer accesses information. For instance, some prominent U.S. companies that market to children have received inquiries about their Web sites from Denmark, which prohibits children's advertising. Some nations do not permit comparative advertising, which, of course, is common in the United States. Similarly, some countries do not permit advertising certain products or using certain depictions that are permissible in the United States.

My concern is that once governments begin to regulate or try to enforce their own laws

against advertising on the Internet, we may be left with a Net containing only that which violates **no** country's laws. Lots of people are thinking about this issue. In conjunction with its presidency of the European Union, the Republic of Ireland hosted a widely attended conference on electronic commerce last fall. Universities and other governments are looking at the legal and social issues raised by the expanding use of this medium in business. I have just returned from a two-day conference at the OECD that took an in-depth look at several aspects of the emerging global marketplace. Ira Magaziner is working on the U.S. government's proposals. DG XV at the EU expects to release its recommendations next month, and the Japanese government is preparing its thoughts on online commerce. International organizations and individual governments are reacting quickly, trying to outrace the evolving technology and formulate government's role. So far, we have found our laws quite adequate to address fraud. What else has to be addressed is an open question.

Innovative Remedies

The Commission is placing more emphasis on innovative remedies, especially informational or financial. For financial remedies, we have increasingly relied upon suspended judgments, security interests, and use of the Treasury Department to collect judgments. Informational remedies used by the Commission in the past year include a variety of disclosures⁽²⁰⁾ and direct notice to consumers.⁽²¹⁾ We also issued administrative complaints in two advertising matters in which corrective advertising or other affirmative disclosures may be required if it is determined that a cease and desist order alone is inadequate to protect consumers.⁽²²⁾ These followed on the heels of the Commission's issuance of two consent orders -- in *Eggland's Best* and *Unocal* -- providing for corrective advertising remedies.⁽²³⁾

I strongly support encouraging creative resolutions, including appropriate consumer education remedies. But the call to innovate should not become a charge to regulate without regard to prudential and jurisdictional restraints. In my view, the Commission recently has slipped over the boundaries of the fencing-in doctrine in the *Coppertone*⁽²⁴⁾ settlement and in the *California Sun-care*⁽²⁵⁾ consent order.

So far, the Commission's most innovative informational remedy is a consumer education requirement in a consent agreement we accepted for comment last month, settling allegations that advertising for Coppertone Kids was deceptive. The complaint alleges that the respondent lacked a reasonable basis for the claim that a single application of Coppertone Kids provides six hours of sun protection for children engaged in sustained vigorous activity in and out of the water. As fencing-in relief, the proposed consent order requires the respondent to design, produce, and print a brochure about the importance of sunscreen usage by children. The order specifies numerous messages or themes to be included in the brochure, only one of which -- the need to reapply sunscreens after toweling or sustained vigorous activity -- seems likely to assist in the prevention of future deception like that alleged in the complaint. The other messages essentially advertise that consumers should use more sunscreen. They do not seem likely to help consumers avoid being misled by possible future violations by the respondent. Accordingly, I departed from the three-Commissioner majority by concluding that the remedy was not reasonably

related to the violations alleged in the complaint.

In *California Suncare*, the consent order settled allegations that California Suncare, Inc. made deceptive claims about the health and safety of ultraviolet radiation ("UVR") exposure and about the benefits and efficacy of its tanning products. I opposed including in the consent order an untriggered disclosure that would appear in general advertising and promotional materials distributed to consumers,⁽²⁶⁾ because it constitutes corrective advertising and I was not convinced that the *Warner-Lambert* standard for imposing such relief was met.⁽²⁷⁾ The consent order provides for other, extensive informational remedies as fencing-in relief, including disclosures that would be triggered by claims about the safety or health benefits of UVR exposure.

There is no question that the informational remedies are reasonably related to the allegations against California Suncare. But the fact that the untriggered disclosure is required to appear in general advertising suggests that its purpose is far more consistent with corrective advertising than with fencing-in: it appears designed to reduce possible lingering false beliefs that may have been created or reinforced by the respondent's past claims that UVR exposure is beneficial.

The standard for imposing corrective advertising is significantly higher than that required for other forms of fencing-in relief. As I said in *California Suncare*, the Commission should not attempt to evade that standard where it is clearly applicable. Strangely enough, for articulating this view, one Commission-watcher dubbed me public enemy number one of corrective advertising. In fact, I see corrective advertising as a powerful weapon in our arsenal of remedies. It should be used prudently when the standard articulated in *Warner-Lambert* has been met.

Indeed, all informational remedies -- whether they involve corrective advertising, affirmative disclosures, consumer notice, consumer education, or restrictions on non-deceptive speech -- should receive particularly close scrutiny from the Commission. These remedies should either address what is alleged in the complaint or fence in the respondent from engaging in future violations like those alleged in the complaint. The potential to chill other types of advertising and to deprive consumers of useful information is real.

Conclusion

How does this apply to the work of the Commission? It requires us to take a hard look at evidence of causation in unfairness cases that may involve restrictions on advertising. Beyond that, when a remedy in any type of case implicates First Amendment rights, the Commission should resist the temptation to obtain through negotiation what it has no colorable chance of obtaining in litigation.

Finally, I would like to emphasize that the natural complement of government restraint is self-regulation -- to the extent permitted by the antitrust laws, of course. Alcohol and tobacco advertising present critical public policy concerns that should be addressed through industry self-regulation and, if necessary, narrowly-tailored government action consistent with the First Amendment. The best of intentions cannot justify excessive

intervention or regulation.

1. The views that I express here are my own and do not necessarily reflect those of the FTC or any other Commissioner.
2. 15 U.S.C. § 45(a).
3. See Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Senate Committee on Commerce, Science and Transportation (Dec. 17, 1980) ("Unfairness Policy Statement"), *appended to International Harvester Co.*, 104 F.T.C. 949 (1984).
4. 15 U.S.C. § 45(n).
5. The Commission recently obtained a consent decree in federal district court that settled allegations that a defendant's practice of submitting multiple entries on behalf of his clients in the State Department's green card lottery was unfair. Another unfairness count alleged that the same defendant violated Section 5 by failing timely to forward to lottery winners the materials necessary for them to apply for visas. *FTC v. David L. Amkraut*, Civ. 97-054-RSWL(BQRx) (C.D. Cal. 1997). The Commission obtained two litigated preliminary injunction orders in which courts found it likely that the FTC would establish that unauthorized bank debits, credit card charges, or billings were unfair. *FTC v. Diversified Marketing Service Corp.*, Civ. 96-0388M (W.D. Okla. 1996); *FTC v. Windward Marketing, Ltd.*, 1:96-CV-615-FMH (N.D. Ga. 1996). Both of these cases subsequently settled as to the majority of the defendants.
6. R.J. Reynolds, File No. 932-3162 (Joint Statement of Commissioners Mary L. Azcuenaga, Deborah K. Owen, and Roscoe B. Starek, III)(June 6, 1994).
7. 15 U.S.C. § 45(n).
8. Health Warnings on Alcoholic Beverage Advertisements: Hearings on H.R. 4493 Before the Subcomm. on Transportation and Hazardous Materials of the Committee on Energy and Commerce, United States House of Representatives, 101st Cong., 2d Sess. 35-41 (1990)(statement of Janet D. Steiger, Chairman, FTC).
9. U.S. Dept. of Health and Human Services, Public Health Service, National Institutes of Health, National Institute of Alcohol Abuse and Alcoholism, *The Effects of the Mass Media on the Use and Abuse of Alcohol*, at v (1995).
10. J. Fisher, *Advertising, Alcohol Consumption, and Abuse: A Worldwide Survey* 24 (1993).
11. The proposition that product differentiation may give firms the power to raise price and reduce output is discussed in § 2.21 of the federal antitrust enforcement agencies' 1992 horizontal merger guidelines. U.S. Dept. of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,573-8.
12. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Court developed a four-part test for assessing the constitutionality of regulations of commercial speech:

For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

13. *44 Liquormart v. Rhode Island*, 116 S. Ct. 1495 (1996). The Court stated that "[w]ithout any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance. Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce market-wide consumption." *Id.* at 1509 (emphasis in original) (citations omitted).

14. "[A]ny conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." *Id.* at 1510 (citations omitted).

15. *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding legislature's decision that its interest in reducing residents' demand for legal casino gambling would be advanced by limiting casino advertising).

16. In *44 Liquormart*, the Court stated that "[t]he reasoning in *Posadas* does support the State's argument [that Rhode Island's ban on liquor price advertising would promote temperance], but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis. . . . [T]he advertising ban served to shield the State's antigambling policy from public scrutiny that more direct, nonspeech regulation would draw." 116 S. Ct. at 1511.

17. The Court distinguished the Rhode Island ban on retail price advertising of liquor, which targeted information about entirely lawful behavior, from the prohibition upheld in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), on the airing of lottery advertising by broadcasters located in states in which lotteries were illegal. 116 S. Ct. at 1510-11.

18. But see *Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821, *aff'd on reconsideration*, 101 F.3d 325 (4th Cir. 1996); *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2575, *aff'd on reconsideration*, 101 F.3d 332 (4th Cir. 1996).

19. *FTC v. Audiotex Connection, Inc.*, No. CV-97 0726 (E.D.N.Y., filed Feb. 13, 1997).

20. See, e.g., Premier Products, Inc., Docket No. C-3720 (Feb. 26, 1997) (consent order) and Comtrad Industries, Inc., Docket No. C-3719 (Feb. 25, 1997) (consent order) (respondents required to disclose the potential risk of harmful or unsafe bacteria buildup associated with use of thawing trays and thermo electric cooler); Conopoco, Inc., dba Van Den Bergh Foods Co., Docket No. C-3706 (Jan. 23, 1997) (consent order that prohibits unsubstantiated heart healthy claims also requires disclosure of total grams of fat per serving whenever claim is made about cholesterol in any margarine or spread that contains a significant amount of fat).

21. See, e.g., Azrak-Hamway International, Docket No. C-3653 (May 2, 1996) (consent order).

22. Ciby-Geigy Corp., Docket No. 9279 (June 26, 1996) (complaint issued); Quaker State - Slick 50, Inc., Docket No. 9280 (July 12, 1996) (complaint issued).

23. Eggland's Best, Inc., Docket No. C-3520 (August 14, 1994) (consent order); Unocal Corp., Inc., Docket No. C-3493 (April 28, 1994) (consent order).

24. Schering-Plough Healthcare Products, Inc., File No. 9423-341 (Feb. 18, 1997) (consent agreement subject to final approval).

25. California Suncare, Inc., Docket No. C-3715 (Feb. 11, 1997)(consent order).

26. The untriggered disclosure reads: "CAUTION: tanning in sunlight or under tanning lamps can cause skin cancer and premature aging -- even if you don't burn."

27. Warner-Lambert Co. v. FTC, 562 F.2d 749, 762 (D.C. Cir. 1977) (finding that corrective advertising is appropriate "if a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases"), *cert. denied*, 435 U.S. 950 (1978).

The ABCs at the FTC: Marketing and Advertising to Children

Summary of Prepared Remarks

of

Commissioner Roscoe B. Starek, III
Federal Trade Commission

Advertising and Promotion Law 1997
Minnesota Institute of Legal Education

July 25, 1997

Good morning. Thank you for the opportunity to discuss marketing and advertising to children.⁽¹⁾ The Commission places a high priority on combating deceptive and unfair practices that harm children. Yet, our enforcement efforts in this area often raise difficult questions about the appropriate role of government and the nature of the relief that we can impose. Marketing and advertising to children touch on several different FTC issues. I'll try to walk you through these with a brief introduction to the Commission's deception and unfairness enforcement authority and then highlight some of the hot topics in children's advertising at the FTC.

Deception and Unfairness Authority

Section 5 of the Federal Trade Commission Act ("FTC Act") prohibits both unfair and deceptive acts or practices in or affecting commerce.⁽²⁾ The FTC's deception standard is set forth in the Commission's Deception Policy Statement.⁽³⁾ It asks whether the challenged representation or practice is one that would likely deceive a consumer acting reasonably under the circumstances in a material way -- that is, in a way that affects the consumer's conduct or choice regarding a product or service. In assessing advertising or other marketing practices that affect or are directed primarily to a particular audience, the Commission considers the effect of the ad or practice on that audience.⁽⁴⁾ Thus, our examination of children's advertising takes into account the limited ability of children to detect exaggerated or untrue statements.⁽⁵⁾ An interpretation that might not be reasonable for an adult may well be reasonable from the perspective of a child. Claims tend to be taken literally by young children. Depictions of a toy ballerina standing alone and twirling may reasonably be understood by children to mean that the ballerina can really dance by herself.⁽⁶⁾ A child who sees an ad showing a fully assembled toy helicopter reasonably may believe that it comes that way right out of the box, so the Commission requires a disclosure if significant assembly is needed.⁽⁷⁾

We can also challenge unfair acts and practices under the FTC Act -- those that cause or are likely to cause substantial injury to consumers when that injury is not reasonably avoidable by the consumers themselves and is not outweighed by countervailing benefits to consumers or competition.⁽⁸⁾ Although injury must be both substantial and likely,

unwarranted health or safety risks can suffice. For example, the distribution of free sample razor blades without protective packaging in home-delivered newspapers poses a direct risk of injury to young children and others who might handle the papers.⁽⁹⁾

In assessing whether injury is reasonably avoidable, the Commission looks at how susceptible the affected audience may be to the act or practice in question. Children tend to imitate other children and they often lack the ability to foresee and avoid dangers. Thus, ads that show young children engaging in potentially hazardous activities, such as cooking hot foods or using a blowdryer next to a bathroom sink filled with water, are unfair even though adults might reasonably avoid injury when engaging in similar activities.⁽¹⁰⁾

Remedies

The Commission has a variety of tools available to it to attempt to prevent future harm to consumers, including law enforcement actions in federal court or before an administrative law judge, issuing rules or guidelines, and consumer education. Court or administrative orders sought by the Commission prohibit deceptive or unfair claims and almost always impose "fencing-in" relief that covers claims or products beyond those that were the subject of the complaint. In appropriate cases, disclosures may be required to correct or prevent deception. Corrective advertising is warranted in the rare case in which the challenged ads substantially contributed to the development and maintenance of a false belief that lingers in the minds of a substantial portion of consumers.⁽¹¹⁾

The Commission also may seek redress for consumers or disgorgement in cases involving dishonest and fraudulent conduct. For instance, a Commission consent order issued last year required a toy manufacturer to refund to consumers the purchase price of toy vehicles deceptively shown in television ads performing such feats as driving and flying under their own power.⁽¹²⁾ In fact, the toys did not have these capabilities and were manipulated off-screen with wires and other hidden devices to make them appear to be moving. As fencing-in relief, the Commission also required the company to send a letter to every television station that aired the commercials, advising them of the settlement and of the availability of self-regulatory guidelines used by many industry members to screen advertising directed to children.

Once a Commission order is in effect, violations of the order may result in the imposition of civil penalties. Last year, a major toy manufacturer agreed to pay \$280,000 in civil penalties to settle charges that it violated a Commission consent order by misrepresenting that children could use a "Colorblaster" paint sprayer toy with little or no effort.⁽¹³⁾

In assessing appropriate remedies for unfair or deceptive practices in advertising to children, we cannot overlook the First Amendment. We've all heard the phrase from our parents or told our own children: "If you can't say something nice, don't say anything at all." While this is a good standard for raising polite children, it is not the standard for speech in a free society.

As the Supreme Court recently reaffirmed in *44 Liquormart*,⁽¹⁴⁾ *Central Hudson* remains

the standard for assessing whether restrictions on commercial speech are permissible under the First Amendment.⁽¹⁵⁾ Under the *Central Hudson* standard for commercial speech, neither deceptive speech nor speech that proposes an illegal transaction is protected by the First Amendment.⁽¹⁶⁾ A restriction on commercial speech that is not misleading and concerns lawful activity must pass three additional tests: the asserted governmental interest in the speech restriction must be substantial; the restriction must directly advance the governmental interest asserted; and the restriction must not be more extensive than necessary to serve that interest.⁽¹⁷⁾

Commission orders that require marketers to stop making false or unsubstantiated statements do not tread on First Amendment rights. When the Commission compels speech as part of a remedy for deception, however, the analysis becomes more complicated. Disclosures that remedy deceptive omissions of material information are correctly viewed as restraints on deceptive speech. Affirmative disclosures or corrective advertising that prevent future deception or correct past deception do not raise First Amendment concerns, unless they in fact go beyond the prevention or correction of deception.⁽¹⁸⁾ Broad fencing-in remedies, for example, that compel general consumer education or other speech not directly related to the prevention of deception are unlikely to survive First Amendment scrutiny.

Restrictions on unfair advertising also are subject to First Amendment scrutiny under the *Central Hudson* standard. In *44 Liquormart*, a plurality opinion written by Justice Stevens confirmed that, in the absence of evidence, courts cannot assume that an advertising restraint will significantly reduce consumption.⁽¹⁹⁾ Instead, the government must establish a causal relationship between its speech restriction and the asserted state interest that the restriction is intended to directly advance.⁽²⁰⁾

A restriction on unfair advertising also has to satisfy the *Central Hudson* requirement that a speech restriction not be more extensive than necessary to advance the asserted government interest. Both the plurality opinion and Justice O'Connor's concurring opinion in *44 Liquormart* agreed that a total ban on price advertising of alcohol did not satisfy this requirement when there were other effective ways for government to achieve its goal.

The ABCs of Children's Advertising at the FTC

Now that I've given you an overview of our authority and enforcement powers, I'll turn to some of children's advertising issues causing the most concern at the Commission. As a primer, you can think of this as the "ABCs" at the FTC: A and B are for alcoholic beverages, while C covers both Camel and cyberspace.

A Controversial History

Not surprisingly, the most controversial children's advertising issues involve possible unfairness violations. The Commission's reliance on its unfairness authority to police children's advertising has a long, and some would say checkered, history. During the 1970s efforts to use unfairness as a basis for restricting children's advertising prompted considerable opposition from the advertising industry and members of Congress. In 1980,

the FTC promulgated an Unfairness Policy Statement that set the parameters for the Commission's use of its unfairness doctrine by describing the Commission's injury and public policy criteria and disavowing any independent reliance on whether the challenged conduct was unethical or unscrupulous.⁽²¹⁾

Nonetheless, reaction to the Commission's expansive attempts at rulemaking based on theories of unfairness in the 1970s deprived the agency of a Congressional authorization for 14 years. Amendments to the FTC Act in 1980 specifically denied the Commission authority to issue any rule regarding children's advertising on the basis that the advertising constitutes an unfair act or practice.⁽²²⁾ These amendments also prevented the Commission for a period of three years from initiating any new rulemaking proceeding restricting commercial advertising based on unfairness,⁽²³⁾ and this prohibition was continued through the Commission's appropriations legislation until 1994.

During this period, the Commission very cautiously exercised its unfairness jurisdiction in law enforcement actions. Shortly after I arrived at the Commission, we accepted several consent agreements alleging that advertisements for 900-number calls unfairly induced children to make calls to cartoon characters, resulting in expensive phone bills that their parents had no reasonable way to avoid.⁽²⁴⁾ The Commission required easy-to-understand disclosures about the need to obtain parental permission and the cost of the call. We also required the call to include a preamble stating, "This telephone call costs money. If you do not have your mom or dad's permission, hang up now," during a grace period in which the call could be terminated without charge. The orders required that parents be provided with a reasonable means to avoid unauthorized calls or one-time refunds upon request for unauthorized calls by children.

Congress later expanded this relief with a broader statute, the Telephone Disclosure and Dispute Resolution Act of 1992, that directed the Commission to issue pay-per-call regulations. Among other things, the 900-Number Rule prohibits ads for non-educational, pay-per-call services directed to children under 12, requires clear and conspicuous disclosures about the need to obtain prior parental permission in ads directed to children under 18, and sets forth criteria for determining when a call is directed to a particular age group.⁽²⁵⁾ Ads are directed to a particular age group if competent and reliable evidence shows that more than 50% of the audience is composed of that age group. If such evidence is not available, other criteria include placement of the ad on a program directed to that age group, the nature of the programming in which the ad appears, and whether the ad, regardless of its location, is directed primarily at the relevant age group in terms of its subject matter, content, tone or the like. This Rule is currently under review by the Commission, and the Commission will seek public comment on any changes it proposes later this year.

After the 900-number cases, the Commission next publicly addressed its unfairness jurisdiction in 1994, when a majority of the Commission -- including me -- decided to close an investigation of whether the R.J. Reynolds Tobacco Company had engaged in unfair practices through its use of the "Joe Camel" campaign to promote Camel cigarettes. We said then that "[a]lthough it may seem intuitive to some that the Joe Camel advertising campaign would lead more children to smoke or lead children to smoke more, the

evidence to support that intuition is not there."⁽²⁶⁾ As the statement said, the record did not show a link between the Joe Camel advertising campaign and increased smoking among children sufficient to justify a charge of unfairness in violation of the FTC Act.

Congress amended the FTC Act later that year to specify that an unfair act or practice is one that causes or is likely to cause substantial injury to consumers that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or competition.⁽²⁷⁾ Essentially, Congress codified the Commission's injury test for unfairness as set forth in the Unfairness Policy Statement. At the same time, Congress expressly barred the Commission from relying on public policy considerations as the primary basis for an unfairness determination.⁽²⁸⁾

The Commission still alleges deception far more frequently than unfairness. Despite the controversial history of unfairness enforcement, it remains an important part of the Commission's consumer protection arsenal. We recently pursued unfairness allegations in several cases,⁽²⁹⁾ and it would be a mistake to underestimate the possibility of additional unfairness enforcement actions. I want to emphasize that the Commission is giving scrupulous care to applying the codified injury requirement, although in any particular case individual Commissioners may disagree as to the level of evidence needed to satisfy the requirement that an alleged unfair act or practice be "likely to cause substantial injury."

A (and B) are for Alcoholic Beverages

Last year, the Distilled Spirits Council of the United States ended its forty-year voluntary ban on liquor advertising on radio and television, precipitating a public debate about the effect of alcohol advertising on children. In response, the Chairman of the Federal Communications Commission has sought to hold hearings to inquire into whether the broadcast of distilled liquor advertising is in the public interest. The inquiry was scuttled when two of the four members of the Commission refused to support the Chairman's initiative because they believe that a memorandum of understanding between the two agencies places this issue within the FTC's jurisdiction.

As a Commissioner of the FTC, I would not presume to opine on the FCC's jurisdiction. I am confident, however, that the Federal Trade Commission has jurisdiction over deceptive or unfair advertising for alcoholic beverages and that it will exercise that jurisdiction in appropriate cases.⁽³⁰⁾ For example, in 1991 the Commission issued a consent order against the Canandaigua Wine Company for alleged deceptive marketing of Cisco, a fortified, flavored wine product.⁽³¹⁾ The Commission charged that Cisco's packaging and advertising misrepresented that it was a low-alcohol wine cooler, despite a high alcohol content. The alleged misrepresentation resulted in alcohol poisoning of several consumers who believed the product to be low in alcohol. The order prohibited representations that Cisco is a low-alcohol, single-serving product and required other changes in marketing and packaging to distinguish the product more clearly from wine coolers.

Use of the Commission's unfairness jurisdiction to address alcoholic beverage advertising

that may appear to be targeted to children requires showing that the advertising causes or is likely to cause substantial injury. The Commission testified to Congress in 1990 that the evidence of a link between advertising and alcohol consumption in general was inconclusive and failed to show a causal relationship.⁽³²⁾ The Commission suggested that these studies and their underlying research methodology were perhaps incapable of accurately measuring any relationship that might exist. At that time, we called for further research. Two years ago, the National Institute of Alcohol Abuse and Alcoholism issued a similar call based on a review of existing studies of the effects of alcohol advertising, promotion activities, and mass media presentations on attitudes toward drinking, actual consumption, and alcohol-related problems. According to this government agency, existing studies were inconclusive for methodological reasons and the lack of sufficient data.⁽³³⁾

In my view, methodologically sound studies are the best way to determine whether and how advertising affects consumption. But the absence of reliable scientific evidence on the effect of a particular advertising campaign on consumption is not dispositive of every unfairness inquiry. The unfairness standard permits us to find that substantial injury is **likely**, not that it has actually occurred. We look at the entire record and consider the flaws or limitations of every piece of evidence in assessing how much weight it deserves. Direct or circumstantial evidence of an intent to target children with advertising for a product they cannot legally consume is particularly relevant to this inquiry. Alcohol advertising also poses difficult First Amendment issues because this advertising concerns behavior that is legal when directed to adults. Without evidence that a restriction on alcohol advertising will significantly reduce consumption by minors, the speech restriction may not survive First Amendment scrutiny.⁽³⁴⁾

Self-regulation may prove an alternative way to address advertising of beer, wine, and spirits that may be especially appealing to or directed to minors. In light of the governmental interest in the effect of alcoholic beverage advertising on children, industry might wish to forestall possible "fix-it-for-you" solutions by coming up with its own fix through industry codes and self-regulatory enforcement mechanisms.

C is for Camel . . .

You might have noticed a few headlines over the past several months about the Federal Trade Commission's administrative complaint against R.J. Reynolds Tobacco Company. The complaint charges that the Joe Camel advertising campaign is an unfair practice that violates Section 5 of the FTC Act. Since the case is in litigation, over my objection, I will not answer any questions about it here. But I can describe what is already on the public record about the majority's decision to bring the case and the opposing views expressed by me and the other dissenting Commissioner.

The complaint alleges that the Joe Camel campaign was intended to make the brand attractive to younger smokers and that one of its targets was "first usual brand" smokers.⁽³⁵⁾ It also alleges that the campaign successfully appealed to children and adolescents under 18, and induced many of them to smoke or increased the risk that they would do so.⁽³⁶⁾ Additionally, it charges that, for many children and underage

adolescents, the Joe Camel campaign caused or was likely to have caused them to begin smoking or to continue smoking.⁽³⁷⁾ Shortly after the campaign began, the percentage of children who smoked Camel cigarettes allegedly became larger than the percentage of adults who smoked Camels.⁽³⁸⁾ In addition, Reynolds allegedly knew or should have known that because of the themes and techniques used in the campaign it would have a substantial appeal to children and adolescents below the age of 18, not just to smokers over the age of 18.⁽³⁹⁾ Moreover, Reynolds allegedly knew or should have known that many smokers begin smoking and become regular smokers before age 18, and that by targeting first usual brand smokers the Joe Camel campaign would cause many minors to smoke Camel cigarettes.⁽⁴⁰⁾ The complaint alleges that consumers who smoke risk addiction and serious adverse health effects, and that many children do not comprehend the nature of the risk or seriousness of nicotine addiction or the other dangerous health effects of smoking.⁽⁴¹⁾

If the complaint allegations are proved, then the Commission seeks an order that would prevent Reynolds from advertising Camel brand cigarettes to children through the use of images or themes related or referring to Joe Camel.⁽⁴²⁾ The order also would require a ten-year public education campaign to discourage minors from smoking.⁽⁴³⁾ Other relief would include a requirement that Reynolds collect and make available to the Commission data about sales of each brand of its cigarettes to persons under the age of 18, including brand share in the underage market.⁽⁴⁴⁾ Additionally, corrective advertising or affirmative disclosures might be ordered if necessary or appropriate, and, if the facts are found as alleged in the complaint, the Commission might seek restitution, refunds, and other types of relief under Section 19 of the FTC Act.⁽⁴⁵⁾

Commissioner Azcuenaga and I dissented from issuance of the Joe Camel complaint, because we concluded that the evidence, including evidence not before the Commission in 1994, was not sufficient to find reason to believe that the law had been violated.⁽⁴⁶⁾ Despite our concern for children's health and a strong intuitive link between the Joe Camel campaign and children's smoking, the information we looked at did not give us reason to believe there is a likely causal connection between the campaign and smoking by children. I also stated that it is not in the public interest for the Commission to expend its scarce resources on this litigation while other developments -- including the settlement discussions between tobacco companies and numerous states -- might largely duplicate any remedies the Commission might obtain. Indeed, the settlement reached in June between tobacco companies and state attorneys general would eliminate Joe Camel and the Marlboro Man.

Since I cannot say more about Joe Camel at this juncture, I'll take advantage of the fact that the letter C also stands for Cyberspace and I'll talk with you about advertising and marketing to children online.

... C is also for Cyberspace

Section 5 applies to online marketing and advertising, and the Commission has brought a number of cases involving pyramid schemes, credit repair scams, and the sale of business

opportunities. None of these were directed at children, but Commission staff are actively monitoring children's advertising on the Internet and online services. I would not be surprised to see some cases involving children's online advertising down the road.

In June 1996, the Commission conducted a public workshop about Consumer Privacy -- including children's privacy -- on the Global Information Infrastructure. Technological tools for limiting children's access to sites and their ability to divulge personal information were discussed, as were various proposals for protecting children's privacy online. There was broad agreement that the elements of effective online consumer privacy protection included notice, choice, security, and access.

When it came to specific ways to accomplish these goals, however, opinions varied considerably. The Center for Media Education ("CME") and the Consumer Federation of America asked the Commission to issue guidelines for permissible industry practices for the collection and tracking of information from children online. Others urged the Commission not to take any action pending self-regulatory efforts by online marketers. The staff report on that workshop contains more detailed information, including a summary of a Commission staff survey of information practices on children's Web sites. You can find that report, and other materials about Commission activities, at our Web site (www.ftc.gov).

In June 1997, we held four additional days of hearings on Consumer Information Privacy, including the collection and use of information in computerized databases, the use of unsolicited commercial e-mail, and children's privacy online. The purpose of the second workshop was to gather new information, including surveys and other empirical data. Commission staff will consider the workshop record and the comments filed to help determine what, if any, further action to recommend in the area of online privacy protections.

Information gathered at our workshops confirms that many children's Web sites collect personal information. Online technology allows marketers to track children's behavior -- to see what sites a child visits and how long the child lingers at a site. By the use of surveys -- sometimes in the form of registration screens that must be completed to access a site or be eligible for a prize -- the site owner can collect other valuable marketing information. All of this information helps marketers identify new consumers at little additional cost, and may allow companies to target consumers very narrowly according to their individual interests.

Most children's Web sites seem to use children's information only for internal purposes, but some disseminate the information more broadly. Only a few provide notice to parents or a way for parents to limit disclosure of the information that is collected. Survey research submitted at the workshop revealed that parents care deeply about the collection and use of their children's information. According to a survey conducted by Louis Harris & Associates, 97% of parents whose children are online believe that Web sites should not collect children's real names and addresses and sell or rent that information to others. Even if children's personal information is used only within the company collecting it, 72% of the parents surveyed oppose its collection. Other attitude surveys presented at the workshop show that parents want to be empowered to be parents on the Net: to have

some degree of control over what information their children may provide to others.

Workshop participants were divided over how to accomplish this. Some stressed technological solutions that may help protect children from data collection not authorized by their parents, and provide a means for obtaining consent from parents or others responsible for supervising children. A number of software blocking and filtering products are available now. Testing by an independent consumers' organization, however, shows that many of these can be circumvented and other testimony indicates that parents -- whose computer skills may lag behind those of their children -- need further education and experience to use these tools effectively.

Many workshop participants argued that self-regulation could resolve concerns about children's privacy online, combined with government enforcement against practices that violate current laws. Several industry guidelines for the collection and use of children's information have recently been announced, and efforts to educate businesses and seek compliance are underway. For example, the Children's Advertising Review Unit ("CARU") of the Council of Better Business Bureaus recently updated its voluntary Guidelines on Children's Advertising to cover marketing to children through interactive electronic media. CARU was established in 1974 by the advertising industry to promote responsible children's advertising. Its self-regulatory guidelines cover a host of concerns, including deception, taking into account children's limited capacity to evaluate the credibility of information they receive.

CARU is in the process of contacting several advertisers that U.S. consumer groups have identified as using possibly deceptive or unfair practices relating to the collection and use of information from children. According to CARU's testimony at the Commission's recent hearings, the advertisers it has contacted so far uniformly have expressed willingness to change their practices to conform with the guidelines. Failure to comply will result in enforcement through self-regulatory review, publication of decisions, and, if necessary, referral to the Federal Trade Commission.

A few participants echoed CME's call for government guidelines on children's privacy. Generally, however, workshop participants favored self-regulation, the development of technological tools to protect privacy, and limitation of government action to narrow circumstances, such as failure to comply with a stated privacy policy.

In my view, it is important to keep in mind exactly what the FTC can and cannot do in the privacy area. We can pursue deceptive practices, such as a false representation that a site will collect information only for one purpose when in fact the site is using it in other ways. We cannot enforce against violations of an industry code unless they also are violations of the FTC Act or another statute we enforce. For example, an explicit claim that a marketer complies with a particular industry code, when in fact it does not, would violate the FTC Act.⁽⁴⁷⁾

We also can pursue unfair practices as defined by the FTC Act. Testimony at the workshop shows that the collection and dissemination of personally identifiable information from children can expose them to being targeted by predators. There are safety risks involved in online activities that encourage children to provide their full

names, street addresses, or E-mail addresses in a way that is accessible to other persons. Some forms of collection and dissemination of children's personal information, without adequate safeguards, might be challenged successfully under the FTC Act as unfair practices based on a likelihood of serious harm to children.

For a more detailed discussion of how the FTC Act applies to online collection and use of information from children, I suggest you take a look at the letter our staff released last week in response to a petition filed by CME. CME asked the Commission to investigate alleged deceptive and unfair practices of "KidsCom," a children's Web site that uses an online survey and an e-mail pen pal program. The staff response outlines several principles that the staff believes should generally apply to the online collection of personally identifiable information from children. The staff concludes that it is a deceptive practice to represent that information is being collected for one purpose when it will also be used for another purpose that parents would find material, unless there is a clear and prominent notice to a parent. The letter also states that it likely is an unfair practice to collect personally identifiable information from children and sell or disclose that information without providing parents with notice and an opportunity to control its collection and use. According to FTC staff, an adequate notice should include: who is collecting the personally identifiable information, its intended use or uses, to whom and in what form it will be disclosed to third parties, and how parents may prevent the retention, use, or disclosure of the information. Parental consent must be obtained *before* children's personally identifiable information is released to a third party. Staff's letter is available on the Commission's Web site.

Conclusion

While I will not make predictions about particular investigations or cases, I can assure you that protecting children from unfair and deceptive practices is likely to remain a priority at the FTC. Self-regulation and consumer education can go a long way toward accomplishing this goal, and I can predict that the Commission will continue to encourage private efforts to empower parents and protect children. We cannot and should not dictate the form of self-regulation, however, or attempt to regulate by threat of Commission action in areas where we lack authority. To do so needlessly risks stifling the burgeoning innovative efforts of the private sector.

1. The views that I express here today are my own, and do not necessarily reflect those of the Commission or any other Commissioners.

2. ² 15 U.S.C. § 45(a).

3. Letter from the Federal Trade Commission to Hon. John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), reprinted in *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 174 (1984).

4. Deception Statement at 178-79.

5. See *Ideal Toy*, 64 F.T.C. 297, 310 (1964).

6. See *Lewis Galoob Toys, Inc.*, 114 F.T.C. 187 (1991).
7. *Id.*
8. 15 U.S.C. § 45(n).
9. See *Philip Morris, Inc.*, 82 F.T.C. 16 (1973).
10. See *Uncle Ben's Inc.*, 89 F.T.C. 131 (1977); *Mego International*, 92 F.T.C. 186 (1978).
11. See *Warner Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).
12. *Azrak-Hamway International, Inc.*, Docket No. C-3653 (1996).
13. *U.S. v. Hasbro, Inc.*, No. 96-451P (D.R.I. Aug. 6, 1996).
14. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).
15. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).
16. See *Central Hudson*, 447 U.S. at 563; *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976).
17. *Central Hudson*, 447 U.S. at 566.
18. See *Warner Lambert*, 562 F.2d at 758; *Beneficial Corp. v. FTC*, 542 F.2d 611, 620 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).
19. ¹⁹ The Court stated that "[w]ithout any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance. Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce market-wide consumption." *44 Liquormart*, 116 S. Ct. at 1509 (emphasis in original) (citations omitted).
20. ²⁰ "[A]ny conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." *Id.* at 1510 (citations omitted).
21. ²¹ See Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate (Dec. 17, 1980) ("Unfairness Policy Statement"), *appended to International Harvester Co.*, 104 F.T.C. 949, 1070 (1984).
22. 15 U.S.C. § 57a(i).
23. 15 U.S.C. § 57a note.
24. *Phone Programs, Inc.*, 115 F.T.C. 977 (1992); *Teleline, Inc.*, 114 F.T.C. 399 (1991); *Audio Communications, Inc.*, 114 F.T.C. 414 (1991). See also *Fone Telecommunications, Inc.*, 116 F.T.C. 426 (1993).
25. 16 C.F.R. §§ 308.3(e), (f).
26. ²⁶ *R.J. Reynolds Tobacco Co.*, File No. 932-3162 (Joint Statement of Commissioners Mary L. Azcuenaga, Deborah K. Owen, and Roscoe B. Starek, III) (June 6, 1994).

27. ²⁷ 15 U.S.C. § 45(n).

28. *Id.*

29. ²⁹ *Sears, Roebuck and Co.*, File No. 972-3187 (consent agreement accepted for public comment) (June 3, 1997) (unlawful collection of debts that were legally discharged in bankruptcy proceedings); *FTC v. David L. Amkraut*, Civ. 97-054-RSWL(BQRx) (C.D. Cal. 1997) (submitting disqualifying, multiple entries on behalf of his clients in State Department's green card lottery; failing timely to forward to lottery winners the materials necessary for them to apply for visas); *FTC v. Diversified Marketing Service Corp.*, Civ. 96-0388M (W.D. Okla. 1996) (unauthorized bank debits and credit card charges); *FTC v. Windward Marketing, Ltd.*, 1:96-CV-615-FMH (N.D. Ga. 1996) (same). *See also R.J. Reynolds Tobacco Co.*, Docket No. 9285 (complaint issued May 28, 1997) (allegedly inducing children to smoke or continue smoking through advertising campaign).

30. The Commission shares jurisdiction with the Bureau of Alcohol, Tobacco and Firearms ("BATF") over deceptive alcohol advertising. The Federal Alcohol Administration Act authorizes the BATF to prevent false, misleading, obscene, or indecent statements in advertisements of distilled spirits, wine, or malt beverages. 27 U.S.C. § 205(f). BATF also has authority over alcohol product labeling and pre-approves package labels. 27 U.S.C. § 205(e).

An agreement between the FTC and the FCC recognizes that the FTC has primary responsibility with respect to unfair or deceptive advertising in all media, including the broadcast media. Liaison Agreement Between Federal Communications Commission and Federal Trade Commission (Apr. 27, 1972), 4 Trade Reg. Rep. (CCH) ¶ 9852.

31. *Canandaigua Wine Co.*, 114 F.T.C. 349 (1991).

32. ³² *Health Warnings on Alcoholic Beverage Advertisements: Hearings on H.R. 4493 Before the Subcomm. on Transportation and Hazardous Materials of the Committee on Energy and Commerce, United States House of Representatives*, 101st Cong., 2d Sess. 35-41 (1990)(statement of Janet D. Steiger, Chairman, FTC).

33. ³³ U.S. Dept. of Health and Human Services, Public Health Service, National Institutes of Health, National Institute of Alcohol Abuse and Alcoholism, *The Effects of the Mass Media on the Use and Abuse of Alcohol*, at v (1995).

34. ³⁴ *But see Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *Penn Advertising v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

35. *R.J. Reynolds Tobacco Co.*, Docket No. 9285 (complaint issued May 28, 1997), Complaint ¶ 6.

36. *Id.*, Complaint ¶¶ 7-8.

37. *Id.*, Complaint ¶ 8.

38. *Id.*, Complaint ¶ 9.

39. *Id.*, Complaint ¶ 10.a.

40. *Id.*, Complaint ¶ 10.b.

41. *Id.*, Complaint ¶¶ 11-12.

42. *Id.*, Notice Order ¶ I.

43. *Id.*, Notice Order ¶ III.

44. *Id.*, Notice Order ¶ II.

45. *Id.*, Notice Order at 1-2.

46. Dissenting Statement of Commissioner Roscoe B. Starek, III in *R.J. Reynolds Tobacco Co.*, Docket No. 9285 (May 28, 1997); Statement of Commissioner Mary L. Azcuenaga in *R.J. Reynolds Tobacco Co.*, Docket No. 9285 (May 28, 1997).

47. See *American Body Armor and Equipment, Inc.*, Docket No. C-3539 (Oct. 21, 1994) (consent order addressing alleged false representation that bullet-resistant vests complied with government agency's voluntary performance standard).

CONGRESSIONAL UPDATE
ADVERTISING UPDATE

AMENDMENT ON TAX DEDUCTIBILITY OF ALCOHOL ADVERTISING (6/26/97)

Senator Robert Byrd is offering an amendment TODAY that would eliminate the tax deductibility of alcohol advertising and fund prevention programs to reduce alcohol related problems. These programs would include counter-advertisements, such as NCADD has proposed, and other locally established prevention programs.

******CALL OR E-MAIL YOUR SENATORS IMMEDIATELY******

URGE THEM TO SUPPORT SENATOR BYRD'S AMENDMENT TO ELIMINATE THE TAX DEDUCTIBILITY OF ALCOHOL ADVERTISING AND FUND PREVENTION PROGRAMS TO REDUCE ALCOHOL-RELATED PROBLEMS

Call the Capitol Hill Switchboard -- 202/224-3121 -- and ask to be connected with your representative's office. Or e-mail your senator:

The United States Senate

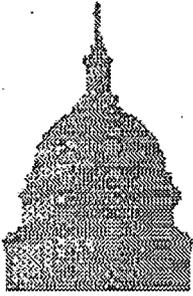
For more information on this issue, contact the Public Policy Office via e-mail at publicpolicy@ncadd.org.

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105TH CONGRESS

First Session (January through August of 1997)
Pending Legislation

DRUG IMPORTER DEATH PENALTY ACT OF 1997

Bill Number: HR41

Description: Provides a sentence of death for certain importations of significant quantities of controlled substances.

Action: House sent to Committee on Judiciary; no action taken by Senate.

REDUCTION OF FEDERAL EXCISE TAXES ON BEER

Bill Number: HR158

Description: Amends the IRS Code of 1986 to reduce the tax on beer to its pre-1991 level.

Action: House sent to Ways and Means Committee; no action in the Senate.

YOUTH VIOLENCE, CRIME, AND DRUG ABUSE CONTROL ACT OF 1997

Bill Number: S15

Description: Prevention and treatment services for youth drug abuse and addiction.

Action: Senate sent to Committee on Judiciary; no action in the House.

FETAL ALCOHOL SYNDROME PREVENTION

Bill Numbers: S148; HR 259

Description: Establishes Fetal Alcohol Prevention Programs.

Action: Sent to House Commerce Subcommittee on Health and Environment; sent to Senate Labor and Human Resources Committee.

"SAFE AND SOBER STREETS ACT OF 1997"

Bill Numbers: HR 982; S 412

Description: The "Safe and Sober Streets Act" would allow the Secretary of Transportation to withhold 5 percent of a state's federal highway funding if the state has not enacted a law that considers an individual who has a BAC of .08 percent or greater while operating a motor vehicle in the state to be driving under the influence or driving while intoxicated.

Action: Sent to House Transportation and Infrastructure Committee; Senate Environment and Public Works Subcommittee on Transportation held hearings 5/7/97.

AMERICAN COMMUNITY RENEWAL ACT OF 1997

Bill Number: HR 1031; S 432

Description: Limits educational requirements for treatment providers.

Action: Sent to House Ways and Means Committee, and House Committees on Education and the Workforce, Banking and Financial Services, and Commerce; sent to Senate Finance Committee.

JUST SAY NO ACT

Bill Number: HR 1067

Description: Prohibits advertising of distilled spirits on radio and television.

Action: House sent to the Subcommittee on Telecommunications, Trade, and Consumer Protection; no companion bill in Senate.

MEDICAID SUBSTANCE ABUSE TREATMENT ACT OF 1997

Bill Number: S 147

Description: Ensures comprehensive treatment programs are available to pregnant women, creates new medicaid treatment service for alcohol and drug dependent women, and defines core services that treatment providers must provide.

Action: None in House; sent to Senate Committee on Finance.

SUBSTANCE ABUSE GROUP HOMES AMENDMENTS OF 1997

Bill Number: HR 385

Description: Amends Public Service Act to require greater community input about the placement of group homes established under the block grants program for the prevention and treatment of substance abuse, and requires officials to monitor home for compliance with community's terms.

Action: Sent to House Subcommittee on Health and Environment; no action in Senate.

FAIR HOUSING REFORM AND FREEDOM OF SPEECH ACT OF 1997

Bill Number: HR 589

Description: Excludes group homes for "recovering drug addicts, convicted felons and sex offenders" from neighborhoods with single famil dwellings. Wipes out current Fair Housing Act protections for individuals in recovery from drug dependence.

Action: Sent to House Judiciary Committee Constitution Subcommittee for a hearing on April 17, 1997; no action in Senate.

BROADCASTING CODE FOR ALCOHOL ADVERTISING

Bill Number: HR 1292

Description: Amends the Communications Act of 1934 to authorize the establishment of a voluntary broadcasting code for alcohol advertising.

Action: Sent to the House Committee on Commerce; no action in the Senate.

NATIONAL NARCOTICS LEADERSHIP ACT AMENDMENT

Bill Number: HR 956
S 536

Description: Amends the National Narcotics Leadership Act of 1988 to establish a program to support and encourage local communities that first demonstrate a comprehensive, long-term commitment to reduce substance

abuse among youth.

Action: Passed in House on 5/22/97; passed Senate 6/8/97; signed into law by President Clinton on 6/27/97.

CHILD ABUSE AND NEGLECT ENFORCEMENT ACT (C.A.N.E.A.)

Bill Number: HR 1419

Description: Reduces the incidence of child abuse and neglect through drug testing of all newborns at birth.

Action: Sent to House Committee Judiciary; No action in the Senate.

HOUSE RESOLUTION ON FCC NOTICE OF INQUIRY

Bill Number: HRes 171

Description: House Resolution 171 calls on the FCC to issue a Notice of Inquiry to seek comment and gather facts related to issues raised by the introduction of distilled spirits advertising on television and radio, with a particular focus on the effects of such advertisements on children and teenagers.

Action: Sent to the House Committee on Commerce; No action in the Senate.

AMENDMENT ON TAX DEDUCTIBILITY OF ALCOHOL ADVERTISING

Bill Number: S.AMDT.540

Description: Eliminates tax deductions for advertising and promotion expenditures relating to alcoholic beverages and to increase funding for programs that educate and prevent the abuse of alcohol among our nation's youth.

Action: Introduced in the Senate 6/26/97 and rejected by vote 6/27/97; No action in the House.

HAROLD HUGHES-BILL EMERSON COMMISSION ON ALCOHOLISM ACT

Bill Number: HR 1549

Description: Establishes a commission to promote policy, evaluate and recommend physician education, reduce, prevent and study alcoholism.

Action: Sent to House Commerce Subcommittee on Health and Environment; no action in Senate.

ALCOHOL TAX EQUALIZATION TO FUND PREVENTION PROGRAMS

Bill Number: HR 2028

Description: Amends IRS code to increase taxes on beer and wine, index beer and wine taxes to inflation and provides these additional revenues for prevention programs.

Action: Sent to House Ways and Means Committee 6/24/97; no action in Senate.

COMPREHENSIVE ALCOHOL ACT OF 1997

Bill Number: HR 1982

Description: Restricts advertising aimed at kids, limits tax deductions and market promotion program and provides health and safety information.

Action: Sent to House Ways and Means and Commerce Committees 6/19/97; no action in Senate.

For more information about these and other federal policy developments concerning alcohol and other drugs, subscribe to [The Alcoholism Report](#).

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