Federal Trade Commission

REMARKS OF

DENNIS A. YAO

COMMISSIONER

FEDERAL TRADE COMMISSION

before the

COMMON GROUND CONFERENCE -- IV

Chicago Regional Office

Chicago, Illinois

November 20, 1992

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

Good afternoon. I am very pleased to be invited to share with you some of my thoughts about consumer protection at the FTC. The views I express here are, of course, my own and are not necessarily shared by any other Commissioner or Commission staff.

In my opinion, the primary objective of the agency is simple: to squeeze the maximum consumer protection impact out of each dollar the Commission spends. Unfortunately, reaching this goal is not always easy. It requires the discipline to set some clear priorities and to make some difficult trade-offs.

Above all, the FTC must maintain an active enforcement presence. Without a "critical mass" of enforcement actions, unscrupulous firms may find the profit incentive of illegal activities irresistible. The agency must also signal that FTC challenges are serious business. In cases of fraud, for example, there is no point in conducting extensive investigations that uncover injurious practices if the Commission accepts settlements that still render the practices profitable.

I will discuss three subjects today. First, I will explain briefly how I typically rank the merits of proposed cases. Second, I will discuss recent efforts to combat telemarketing fraud -- an area at the top of my enforcement agenda. Finally, I will discuss four important aspects of the case development process: concerning environmental claims, the need for flexibility in regulating a complex area with evolving scientific understanding and consumer perception; in the food area, the need for a harmonious federal regulatory scheme; in the area of remedies, the search for innovative and effective means of

addressing problematic practices beyond "cease-and-desist" orders; and, finally, in the area of jurisdiction, the need to assert jurisdiction when necessary and appropriate.

I. CASE SELECTION

My objective in selecting cases is the same as my overall consumer protection objective: to get the maximum consumer protection impact. This too involves difficult trade-offs. There is simply no way to get around the problem that resources expended on a "green" case means less spent on another "green" case, less spent on a health claim case, less spent on a credit case, or less spent on telemarketing fraud.

It is difficult to predict which individual cases (or types of cases) will bring consumers the biggest bang for their consumer protection bucks. However, there are three benchmark questions that I find useful when trying to rank the merits of alternative cases.

The first case-selection question is: "How difficult is it for consumers to protect themselves from the potentially deceptive practice?" If "consumer self-protection" is not readily feasible, then all else equal, the case is likely to be high on my list of enforcement priorities.

The relative feasibility of "consumer self-protection" depends on several factors. One consideration is whether consumers can evaluate the truthfulness of potentially deceptive product claims for themselves.

A vigorous FTC presence is especially important when consumers cannot evaluate marketing claims even after a product is purchased and used. Such claims are quite common. For example, it is very difficult, if not impossible, for consumers to determine whether an aerosol is "environmentally friendly," whether a favorite ice cream now contains 100 fewer calories than before, or whether a cereal can help to reduce the risks of cancer. Thus, environmental cases and food cases are high on my list of priorities, in part, because they tend to involve claims that consumers cannot easily evaluate for themselves.

In contrast, FTC action is typically less important when consumers can easily determine whether businesses have fulfilled their promises and when promises are backed up with legitimate warranties. For example, if consumers can see that a bicycle advertised as "nearly new" actually has bald tires and a bent fender, then consumers should be able to discount the claim sufficiently to prevent the claim, even though false, from affecting purchase decisions. Of course, all Commission laws and rules must be enforced and care must be taken to ensure that businesses do not receive the signal that they can take illegal actions without fear of Commission enforcement.

The second case-selection question that I ask is: "How much consumer injury does the potentially deceptive practice cause?" Practices that expose a large number of consumers to serious health and safety risk pose the greatest possibility of serious injury. For example, in a recent series of cases, the Commission

has challenged deceptive claims regarding chemical face peels.[1] Also on the high end of the spectrum are cases involving expensive items, such as investments in precious metals.[2] Cases involving largely minor technical violations of trade regulation rules appear to involve less consumer injury. Although it seems obvious that consumers are served best when the Commission pursues cases that result in serious rather than de minimis consumer injury, this calculus may change when widespread deception requires a broad attack on the enforcement front. For example, the Commission has recently initiated several actions concerning technical violations of the Franchise Rule.[3]

The third question I ask is: "Is there a feasible remedy that will solve the deception problem without inadvertently causing more harm than good?" For example, if the staff proposes a disclosure remedy in an advertising case, I would like to feel comfortable that the disclosure will have the desired effect

---

[1] Medical Marketing Servs., Inc., File No. 892 3112 (Oct. 20, 1992) (proposed consent order) (misrepresentations regarding risks of chemical face peel); BelAge Plastic Surgery Center, No. C-3401 (Sept. 8, 1992) (final consent order) (misrepresentations regarding breast implants); Dr. Scott M. Ross d/b/a Mpls. Center for Cosmetic and Laser Surgery, No. C-3363 (Jan. 9, 1992) (final consent order) (misrepresentations regarding risks of liposuction surgery). See also Hearings on Questionable Franchising of Chemical Acid Peels, Nov. 2, 1989, House Subcom. on Regulation and Business Opportunities.

[2] See, e.g., FTC v. First American Trading House, Inc., Civ. No. 92-6049-Civ.-Paine (S.D. Fla. 1992).

[3] FTC v. Perkits, Inc., Civ. 1-92-380 (E.D. Tenn. Aug. 6, 1992); United States v. Telecomm, Inc., Civ. 92-3797 (JWB) (D. NJ Sept. 11, 1992); United States v. WHY USA, Inc., Civ. 92-1227-PHX-SMM (D. Ariz. June 26, 1992).

without negative consequences that can injure consumers. One pragmatic approach to handling this problem is to determine if there is a clearer way of addressing the deception problem without chilling truthful information. In short, good policy requires avoidance of overly restrictive actions that would deter legitimate businesses from providing consumers with accurate and useful information.

II. FRAUD

Telemarketing fraud is high on my list of enforcement priorities for several reasons. First, individual consumers often find it difficult to protect themselves against injury from telemarketing fraud. In fact, fraudulent telemarketers frequently target vulnerable groups such as the elderly and recent immigrants.[4]

Second, consumer injury from telemarketing fraud is enormous. The House Committee on Government Operations reports that consumers lose between $3 billion and $40 billion each year to fraudulent telemarketers.[5] Losses are not only staggering in

---

[4] According to a recent House Report, retirees and immigrants are often victimized by telemarketing fraud. House Committee on Government Operations, The Scourge of Telemarketing Fraud: What Can Be Done Against It?, H.R. Rep. No. 421, 102d Cong., 1st Sess., at 5. The Commission has handled cases where the elderly have been singled out for fraud. In Morgan Whitney, the Commission presented the court with evidence that the elderly were targeted by the company for the fraudulent sale of interests in precious metals. FTC v. Morgan Whitney Trading Group, Inc., No. 90-4887 RSWL (SX) (C.D. Cal. Sept. 12, 1990).

[5] Id. at 7.

the aggregate; telemarketers have been known to swindle individual consumers out of their life savings.[6]

Finally, the appropriate remedies in telemarketing fraud cases are typically clear-cut and stringent sanctions against bad actors are unlikely to deter honest businessmen from providing beneficial telemarketing services. The only issue then is the effectiveness of our orders in ensuring that fraud is actually stopped. Aggressive enforcement against telemarketing fraud requires that the Commission seek the strongest remedies available. I support the use of bans and bonds to stop recidivist actors and others whose fraudulent conduct is particularly egregious from inflicting additional harm on consumers.

III. THE CASE DEVELOPMENT PROCESS

Now I want to discuss four important aspects of the case development process: for environmental claims, the need for flexibility in regulating a complex area with evolving scientific understanding and consumer perceptions; in the food area, the need for a harmonious federal regulatory scheme; in the area of remedies, the search for innovative and effective means of addressing problematic practices beyond "cease-and-desist" orders; and, finally, in the area of jurisdiction, the need to assert jurisdiction where necessary and appropriate in order to fulfill the Commission's consumer protection mandate.

---

[6] According to the House Report, some retirees have lost their entire life savings and have been forced to return to the workforce in low paying jobs. Id. at 6.

A. Environmental Advertising Claims

During my first year as a Commissioner, I strongly supported and actively participated in the drafting and issuance of the Environmental Marketing Guidelines.[7] The Environmental Guides were quite well received and we are proud of them.

Evidence showed that consumers were confused by the multitude of "green" claims, many of which deceptive. As a result, consumers began to mistrust the veracity of "green" claims. The Commission felt prompt guidance was necessary in this area because consumers cannot judge before, or even after, purchase whether many environmental claims are truthful.

In drafting the Environmental Guides, the Commission was determined to avoid overly rigid standards and definitions that could be rendered obsolete by changing scientific understanding or by changing consumer perceptions. In particular, our guidance for claims relating to degradability, recyclability, and recycled content allow advertisers to qualify claims in a manner that avoids deception, but still communicates any significant environmental advantages their products might have. Further, the Commission committed itself to a review of the Guides in three years to determine whether our objectives are being achieved.

Why this need for flexibility? For one, it seems likely that consumers' perceptions of environmental claims will change over time and, two, our scientific knowledge of environmental

---

[7] Guides for the Use of Environmental Marketing Claims, July 1992 [hereafter "Environmental Guides" or the "Guides"].

problems will change as well. Indeed, these points are interrelated, because our changing scientific understanding of environmental problems will alter consumer perceptions.

One section of the Environmental Guides merits special discussion because it illustrates the importance of flexibility, and why the Commission needs to keep abreast of consumer understanding of environmental issues and perception of advertising claims. This is the section that deals with General Environmental Benefit Claims, such as "Environmentally Friendly". The Guides advise that, unless an advertiser can substantiate "every express and material, implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product," "broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted."[8]

The Commission was concerned, and rightly so, that sweeping environmental benefit claims may mislead many consumers who expect the product to have beneficial qualities that it may in fact lack. The Guides do not, and we cannot, answer definitively at this time how one should judge which material, implied claims are derived from any given general environmental benefit claim. Nor was it possible to specify how carefully and in what manner various general claims must be qualified in order to avoid misleading inferences.

---

[8] Guides at 9.

Given the evolving nature of consumer understanding of a technical and relatively new area, consumer perception research (conducted by both the Commission and those outside the Commission) has proved very useful in considering the Guides and additional research will prove very useful to us in our enforcement activities. Before I proceed, I would stress, however, that any such research must be ongoing and, whenever possible, anticipate issues that the Commission is likely to face in future cases. Our goal should be to facilitate and focus our law enforcement programs, not to delay important environmental cases until individual copy tests can be designed and conducted. Furthermore, my comments here in no way are intended to suggest that the Commission must have extrinsic evidence before challenging green claims. As you all know, it is settled law that the Commission does not require extrinsic evidence for advertisements when the language or depictions are clear enough to permit the Commission to conclude with confidence that the ads convey a particular implied claim to reasonable consumers. This standard has been uniformly sanctioned by the federal courts, including the Supreme Court.[9]

---

[9] See FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965); Bristol-Myers Co. v. FTC, 738 F.2d 554, 563 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); American Home Prods. Corp. v. FTC, 695 F.2d 681, 687 n.10 (3d Cir. 1982); Simeon Management Corp. v. FTC, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 4041 (D.C. Cir. 1985); Thompson Medical Co. v. FTC, 791 F.2d 189, 197 (D.C. 1986), cert. denied, 479 U.S. 1086 (1987). But see Kraft, Inc. v. Federal Trade Commission, [Current Binder] Trade Reg. Rep. ¶ 69,911 at 68,352 (7th Cir. July 31, 1992) ("Our holding (continued...)

By way of illustration of the helpful role consumer research may play, let us take a look at an "Environmentally Friendly-No CFC's" claim for aerosol products. CFC's are chlorofluorocarbons that have been found to harm the upper ozone layer. The government has banned non-essential use of CFC's since 1978.[10]

Consider how consumers might interpret the broad general claim ("Environmentally Friendly") that is followed by a more specific scientific term ("No CFC's"). Do consumers know what CFC's are, or, if referenced on an aerosol spray can, at least have an idea that they relate in some way to the depletion of the ozone layer? If so, do consumers interpret the "No CFC's" claim as qualifying and narrowing the broader "Environmentally Friendly" claim that precedes it? That is, do they interpret the claim to be "Environmentally Friendly <u>in the sense that</u> it contains no CFC's", or do consumers think the product is friendly on <u>all</u> counts, <u>including</u> the ozone layer?

If consumers interpret the claim narrowly, and if the product contains no other substances (such as Hydrochlorofluorocarbons (HCFC's)) that deplete the ozone

---

[9](...continued)
does not diminish the force of Kraft's argument as a policy matter, and indeed, the extensive body of commentary on the subject makes a compelling argument that reliance on extrinsic evidence should be the rule rather than the exception"), <u>petition for cert. filed</u>, No. 92-744 (Oct. 29, 1992).

[10] 43 Fed. Reg. 11324, March 17, 1978.

layer,[11] the claim could be considered qualified and substantiated. Suppose, however, that consumers read the claim much more broadly and that the product is an aerosol spray containing Volatile Organic Compounds (VOC's), which contribute to ground smog, another environmental problem. In that case an enforcement action would be merited. Consumer perception research can assist decisionmakers on these questions and, in addition, is useful for evaluating what qualifications would be needed to avoid deception.

For example, could the problem be solved simply by changing "Environmentally Friendly--No CFC's" to "Ozone Friendly--No CFC's"? Or would consumers associate "ozone" with the air quality ozone readings that have been broadcast on smoggy days and infer that the aerosol was friendly to the upper and lower atmosphere? Would more specific and detailed qualifications clarify the message, or would consumers simply be confused by the disclosures or continue to receive a broad environmental benefit message even though the claim was tied to a narrow environmental attribute?

As consumers learn more about the dangers of HCFC's and the like, they may be better prepared to understand such green claims. Consequently, by providing a three-year review, the Guides are kept flexible to change as consumer perceptions change. Of course, there needs to be stability in enforcement.

---

[11] Title 6 of the Clean Air Act specifies that CFC's are considered a Class I ozone-depleter, while various compounds of HCFC's are listed as Class II ozone-depleters.

Otherwise, companies will be chilled from making any "green" claims which, in turn, can stifle product innovation that is beneficial to the environment. However, over time, the Commission's approach may evolve as consumers become more savvy about environmental benefit claims.

Another reason that the Commission was persuaded that the Guides must remain flexible is because our scientific understanding of environmental problems is always advancing. For example, there is a debate in the scientific community about the chemical dioxin, which is produced by paper mills through bleaching processes that use chlorine and chlorine compounds and which is relevant in our considerations about environmental claims involving paper products. Only last month, the Wall Street Journal reported that an independent scientific panel at the EPA indicated that the danger from dioxin may be broader and more serious than previously thought: it may have reproductive, behavioral and immune-system effects on humans and it may possibly cause cancer.[12] All the scientific evidence is not in yet to make a judgment on the question of dioxin. When this debate is sufficiently resolved, the Commission may need to reconsider its position regarding environmental claims made for products involving that chemical. This is because of the direct effect of dioxin and the interrelation between scientific

---

[12] "Dioxin's Health Risks May Be Greater Than Believed, EPA Memo Indicates," Wall Street Journal at B9 (Oct. 16, 1992).

understanding of environmental harms and consumers' understanding of environmental problems.[13]

This latter interrelation also demonstrates why it is important that not only the Environmental Guides, but also provisions in particular consent orders in the environmental area, remain tied to consumer perceptions, so that, as consumer perceptions change, companies will not be saddled with outdated consent orders. Concomitantly, because of evolving science, slavish consistency in consent orders may produce undesirable results in the environmental area.

B. Food Advertising Claims

Another area that will require substantial Commission attention during the coming months is food advertising. Here, the challenge facing the Commission is to forge a harmonious regulatory policy beneficial to both consumers and businesses. However, the regulatory framework in food marketing is very different from environmental marketing. Congress has enacted detailed legislation governing food labeling, requiring the FDA to issue a comprehensive set of implementing regulations. Both the statute and the regulations, however, are specifically directed to labeling and not to advertising.

Nonetheless, a harmonious regulatory scheme will greatly benefit consumers and businesses, and I strongly support the

---

[13] Of course, an additional result of changes in science is that a claim that could be substantiated yesterday may be unsubstantiated tomorrow.

objectives of this recent legislation in enabling consumers to select foods to protect and improve their health.

The foremost issue in this area, once the FDA regulations are final, is to determine how the Commission should harmonize its current approach to food advertising with the FDA regulations.

I am committed to developing an enforcement program that would form a coherent and harmonious regulatory framework. In line with this, it is important that industry, consumer groups and other governmental agencies assist the Commission by presenting their carefully thought-out views on these issues. I agree with Chairman Steiger that written comments would be welcome and should take into account: (1) the Commission's existing statutory authority; (2) the goals of the Nutrition Labeling and Education Act of 1990; (3) the differences between advertising and labeling; and (4) the objectives of the Commission's advertising policy in ensuring the flow of truthful and substantiated information.[14]

Finally, I am aware that food advertising is an area where the States' attorneys general have been particularly active in the past. I would hope that this close working relationship will continue. Just as it is important for the Commission to develop enforcement policies that are harmonious with FDA regulations, we should also coordinate our enforcement approach with the States.

---

[14] See Chairman Steiger's Remarks Before the Association of National Advertisers, Inc. -- 83rd Annual Meeting and Business Conference, The Homestead, Hot Springs, Virginia (Oct. 12, 1992).

During the coming months, I hope there will be close communication between our agency and the States on these issues. The benefits to the Commission of this approach are aptly illustrated by your careful review of environmental marketing issues, which provided us with valuable information in developing our Green Guides.

C. Innovative Remedies

When there is evidence of persisting consumer misperception largely derived from a respondent's deceptive advertising, I believe that the Commission should consider remedies beyond a mere cease-and-desist order. The Commission has recently had occasion to consider a broader remedy for claims by oil companies concerning the benefits of high-octane gasolines. A report by the consumer group Public Citizen estimates that $1 to $3 billion worth of high-octane gasoline was needlessly sold to consumers in 1990 alone.[15] Although somewhat more cautious in noting that the existing evidence is not conclusive, a report by the General Accounting Office estimates that consumers may be spending hundreds of millions of dollars yearly on unnecessary purchases of higher octane gasoline.[16] The problem is that, according to the GAO report, only 3 to 21% of all vehicles need premium

---

[15] Fueling the Public: An Investigative Report on the Selling of Gasoline (Public Citizen, August 1992).

[16] U.S. General Accounting Office, Gasoline Marketing: Premium Gasoline Overbuying May Be Occurring, but Extent Unknown, Report to the Chairman, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on Judiciary, U.S. Senate, February 1991.

gasolines -- high performance cars, older models, and cars equipped with knock sensors.[17] Thus, by comparing these estimates with gasoline sales data, the GAO report estimates perhaps as much as 3% to 26% of premium gasoline sales may be unneeded. Moreover, there is survey evidence documenting the persistence of consumer misperception: a survey by an oil company reports that 64% of consumers believe that premium gasoline improves performance for all cars.[18]

The Commission recently accepted a final consent order involving Sunoco's Ultra, a 93/94 octane gasoline, wherein Sunoco allegedly claimed that Ultra provided superior engine power and acceleration for cars generally as compared to other gasolines.[19] The advertising at issue extolled the superior power and acceleration that Sunoco Ultra provides by stressing that only Ultra has 94 octane and that this octane superiority improves performance for all cars. Because Sun Oil Co., Sunoco's predecessor, had in 1974 similarly been charged with falsely linking octane to general automobile engine performance, and because of the persistence of consumer misperception about the link between octane and performance, my colleague, Commissioner

---

[17] "Knock Sensors" can adjust engine performance depending on the octane level used in order to prevent engine knocking. Because of that feature, using a higher octane arguably can improve the engine's performance.

[18] "Why Pay More for Premium?", AAA World at 8 (Jan.-Feb. 1991).

[19] Sun Company, Inc., et al., Docket No. C-3881 (May 14, 1992) (final consent order).

Deborah Owen, dissented from the decision to accept the consent order and instead called for "stronger relief" "that would truly benefit consumers." Her dissent naturally raised the question of whether corrective advertising or a requirement that Sunoco engage in consumer education would have been a more appropriate remedy in that case.

I agree that stronger remedies are needed when there is evidence of persistent consumer misperception. The critical question -- as it always is when it comes to a remedy -- is to find one that actually works. The FTC's experience with using corrective advertising -- ordering the respondent to place particular corrective statements in future advertising -- has been less than stellar. Mounting evidence in the academic community has questioned whether the Commission's past corrective advertising orders have worked, largely because of evidence that those corrective messages may not have been understood by consumers.[20] In concurring with the majority in the Sunoco matter, I suggested that it might be appropriate for the Commission to require Sunoco to engage in consumer education. The Commission has recently required companies to conduct consumer education programs and, although the jury is still out, such programs may be more effective. A consumer education remedy

---

[20] W. Wilkie, D. McNeill & M. Mazis, "Marketing's 'Scarlet Letter': The Theory and Practice of Corrective Advertising," 48 Journal of Marketing 11-31 (Spring 1984); J. Jacoby, M. Nelson & W. Hoyer, "Corrective Advertising and Affirmative Disclosure Statements: Their Potential for Confusing and Misleading the Consumer," 46 J. Marketing 61 (1982).

may be less onerous and more effective than a traditional corrective advertising requirement in that it may communicate the message to consumers more successfully. Such an approach has been used by the Commission. For example, in a recent case concerning the Commission's "R-value" metric for home insulation, the Commission required the respondent, Sears, Roebuck & Co., to devise a consumer education program on the importance of R-value as a metric for comparing various types of home insulation.[21] Indeed, the FTC, joined by AAA and the EPA, has embarked on a nationwide education campaign concerning octane.

Currently, Commission staff is conducting several new investigations involving similar claims of superior performance for higher octane gasoline. If and when staff recommendations are forwarded to the Commission, the Commission will be reviewing various options concerning remedies. I believe that consumer education might be an appropriate stronger remedy to counter consumer misperceptions if evidence supports that those misperceptions persist and that firms are playing on those misperceptions to the detriment of consumers. I must add, however, that each case must be judged on its own merits and other equities or concerns may well counsel to the contrary. I am also open to any other ideas that could address the problem.

---

[21] United States v. Sears, Roebuck & Co., Civil Action No. 89-3383 TAF (D.C.C. 1989).

D. Jurisdiction

Congress intentionally granted the Commission broad jurisdiction under Section 5 of the Federal Trade Commission Act to give the Commission the legal means to tackle new forms of deceptive and unfair practices.[22] Consequently, just as much of our regulatory authority overlaps with those of State consumer protection agencies, there is the potential that the Commission's activities could overlap with the jurisdiction of another federal agency. While I believe that the Commission has an obligation, as a matter of comity, to work closely with other federal agencies, the Commission cannot abdicate its consumer protection mission simply because another agency could assert jurisdiction in a particular area. Rather, I prefer working closely with other agencies who have overlapping jurisdiction -- much as we work closely with States -- to coordinate our efforts for maximum beneficial effect to consumers.

For example, in the Commission's recent lawsuit against the Sporicidin Company,[23] in which the Commission charged that Sporicidin falsely claimed that its product in a highly diluted form is a sterilant and a high-level disinfectant, the Commission joined the EPA and the FDA in simultaneously initiating law enforcement actions against the company. Two of my colleagues dissented from the Commission's decision. They did so because

---

[22] See S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914); 51 CONG. REC. 12,024 (1914) (Remarks of Sen. Newlands).

[23] FTC v. Sporicidin Co., No. NJG-91-3543 (D. Md. Dec. 13, 1991).

the Commission challenged claims that had previously been registered by the EPA under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").[24] Although the particular legal issue is somewhat complicated, their decision basically grew out of a concern that, because the EPA has jurisdiction in this area to register certain claims pursuant to the FIFRA, the Commission was ousted of jurisdiction over those particular allegedly deceptive claims.

My own view is that Sporicidin is an excellent example of how the Commission can show comity, but nevertheless not abdicate its mission by joining with other agencies to challenge particular practices. Courts have recognized that federal agencies often share concurrent jurisdiction over certain regulatory activities.[25]

The important point is that, rather than viewing jurisdictional overlaps between agencies as absolute bars to any action, the Commission should view them as opportunities to work closely with sister agencies to coordinate activities and take

---

[24] "FTC, FDA, EPA Corner Disinfectant Maker Sporicidin," FTC Watch at 2 (Dec. 23, 1991).

[25] E.g., Thompson Medical Co. v. FTC, 791 F.2d 189, 192-93 (D.C. Cir. 1986) (court rejected argument that the FTC is indefinitely barred from all regulatory authority over over-the-counter medicine while the FDA conducted a review of drug safety, noting that "ours is an age of overlapping and concurrent regulatory jurisdiction"), cert. denied, 479 U.S. 1086 (1987). See also Monongahela Power Co. v. Marsh, 809 F.2d 41, 48, 53 & n. 116 (D.C. Cir.) (court rejected argument that Federal Energy Regulatory Commission and Army Corps of Engineers did not have concurrent jurisdiction over hydroelectric projects), cert. denied, 484 U.S. 816 (1987).

advantage of each agencies' particular expertise. Moreover, law enforcement cooperation can ensure that companies will not be subject to duplicative and inconsistent standards by the various agencies.[26] Our experience in Sporicidin and other cases suggests that other federal agencies are eager and willing to work with us and to use our special expertise to prevent deceptive practices in advertising. Should other agencies fail to accept the invitation to work with us, however, I would urge the Commission to take action against deceptive advertising, even in areas of concurrent jurisdiction with other federal agencies.

I also believe that the Commission must not shy away from the assertion of jurisdiction over nonprofits when lawful and appropriate. As a recent article in the Wall Street Journal shows, some charities have been engaged in instances of fraudulent fund-raising. Two states -- Connecticut and Pennsylvania -- charged four charities with making fraudulent fund-raising claims that involved representing near-worthless goods as worth millions of dollars for children, cancer patients and drug abusers.[27] Section 5, in conjunction with the definition of "corporations" in Section 4, limits the FTC's jurisdiction over some, but not all, non-profit corporations.[28]

---

[26] See, e.g., National Ass'n of Securities Dealers, 422 U.S. 694 (1974).

[27] "Four Charities Charged by Two States with Fraudulent Fund-Raising Claims," Wall Street Journal at C23 (Aug. 4, 1992).

[28] Section 5(b) of the FTC Act grants the Commission jurisdiction over "any ... person, partnership or corporation." (continued...)

As the extent of this exemption is an issue the Commission is currently considering in the College Football Association appeal, I do not want to speak at length about it. However, the Commission has demonstrated in its recent case against "Voices For Freedom", a group that purported to fund a message center for U.S. troops during the recent Gulf War, that it will aggressively pursue bogus non-profit entities.[29] And in the recent provisional consent agreement with the United States Golf Association, the Commission alleged that the non-profit association failed to make country-of-origin and other disclosures required by the Textile Fiber Products Identification Act.[30] I believe these matters demonstrate that, when appropriate and lawful, the Commission will not shy away from enforcement actions concerning nonprofits.

---

[28](...continued)
15 U.S.C. § 45. Section 4 defines "corporation" as follows:

> any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

15 U.S.C. § 44.

[29] FTC v. Voices for Freedom, No. 91-1542-A (E.D. Va. Oct. 1, 1991). See also Ohio Christian College, 80 F.T.C. 815 (1972) (Commission asserted jurisdiction over ostensibly nonprofit entity that was merely a shell through which the individual respondents obtained profit).

[30] United States Golf Association, File No. 912-3265 (Oct. 7, 1992).

CONCLUSION

Many of the FTC's enforcement activities are closely coordinated with your State agencies. Given the size of the task and the limits on FTC resources, the Commission cannot hope to stop all areas of deceptive practices. Fortunately, State and local consumer protection agencies have joined forces with the FTC -- and this coordination has been a particular benefit in the area of telemarketing fraud. For example, joint efforts have helped implement an efficient enforcement strategy known as the "Root" approach, which concentrates on attacking those operations that provide the means for boiler-rooms to flourish. With the extensive assistance of several State and local consumer protection agencies, the FTC has brought four actions against major "roots" since January of this year.[31] By eliminating duplication of effort and encouraging development of specialized

---

[31] The Florida AG's office helped the Commission to bring a case against defendants who aided and abetted telemarketers in the fraudulent telemarketing of vacation travel certificates. FTC v. Passport International, Inc., 92-275-CIV-ORL-22 (M.D. Fla. Apr. 9, 1992). The Nevada AG's office helped the Commission to sue Nevada's largest telemarketing operation for selling merchandise through a deceptive prize promotion scheme and aiding and abetting others. FTC v. Pioneer Enterprises, Inc., CV-S-92-615-LDG-RJJ (D. Nev. July 20, 1992). The Los Angeles Regional Office worked with the New Mexico AG's office, the Clovis, New Mexico District Attorney's Office, the FBI and the U.S. State Department to pursue telemarketers who used a deceptive price promotion scheme. FTC v. David Wetherhill, 92-2295 DT (EEx) (C.D. Cal. Apr. 15, 1992). Finally, with the help of the AG's offices in Oregon and Texas, a case was brought against a 900 number "pay-per-call" root deceptively marketing credit card information packages. FTC v. MDM Interests, Inc., Civ. No. H-92-0485 (S.D. Tex. May 8, 1992) (amended complaint).

expertise, coordinated efforts can protect more consumers than we could acting individually.

I look forward to working with you on the issues I have touched on today as well as other issues that will undoubtedly arise in our shared interest in advancing a pro-consumer agenda for the 90's.