Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission

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ENHANCING THE FLOW OF INFORMATION IN THE MARKETPLACE: FROM CAVEAT EMPTOR TO VIRGINIA PHARMACY AND BEYOND AT THE FEDERAL TRADE COMMISSION*

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In the now bygone era of caveat emptor, the law assumed that

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buyers either knew or could readily ascertain everything they
needed to know about marketplace transactions by simply inspect-
ing the goods before purchase.\(^1\) Similarly, free speech theorists like
John Stuart Mill proposed a First Amendment model based on
self-reliance and perfect knowledge.\(^2\) In Mill's "marketplace of
ideas," the simple safeguard of excluding government censorship
would assure that all sides of any debate would be aired, so that
citizens could make up their own minds after being exposed to a
healthy clash of arguments and counter-arguments.\(^3\)

These early models assumed that the necessary facts were avail-
able to all participants, but conditions of the modern marketplace
have undermined this notion. Goods are complex, physical attrib-
utes are subject to manipulation, and counterarguments to sellers' claims may never be voiced. Therefore the rule of caveat emptor has mostly given way to more modern notions of consumer protec-
tion; the marketplace of commercial ideas in the twentieth century has been made subject to regulations prohibiting deception and unfairness.\(^4\)

Using its statutory powers, the Federal Trade Commission until the 1970's functioned primarily to eliminate deceptive message content but did little to compel or urge voluntarily the addition of useful content as a remedy for deception or unfairness. Some of its successes, in fact, had the possible side effect of prompting sellers to turn to advertising that was, although not illegal, perhaps not as useful because it failed to provide much factual data. More re-
cently, remedies which encourage the provision of more information from different sources, or which improve the incentives of speakers to provide better information, have begun to be used. Application of the first amendment to the marketplace\(^5\) has en-
couraged and in fact demanded the development of remedies for deception and unfairness which concurrently increase rather than

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\(^1\) See generally Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133 (1931).
\(^3\) Id.
stifle the free flow of truthful information.

The purpose of this article is to trace the history of commercial speech regulations, with a focus on the development of those FTC remedies that result in better marketplace information for consumers. Section I describes the heritage of the past which prompts FTC law to allow the seller to avoid factual information. The possibility that this loophole might be closed is examined. Section II examines the measures that the FTC has taken under its legislative authority to prompt sellers to provide the public with more information than would otherwise be available. Section III discusses recent First Amendment developments pertaining to advertising which have been utilized to add to the flow of marketplace information. Section IV discusses further potentials for assuring the provision of still more information.

I. CAVEAT EMPTOR LIVES ON

A. Caveat Emptor — The Historical Antecedent of Modern Marketplace Law

The zeal with which modern regulators attack the inaccuracies of sellers’ claims is actually a relatively recent trend. It was preceded historically by a period in which the needs of the burgeoning trade system apparently dictated that the law take a “hands off” approach toward buyer/seller transactions. Thus, from around 1500 until the start of the 20th century, the rule of “caveat emptor” (“let the buyer beware”) held sway. This doctrine will be traced through its historical development and it will be shown that some vestiges of it still influence aspects of current regulation.

During the Middle Ages, the Church-influenced legal system had imposed a quasi-moral obligation on sellers to stand by the representations they made about their wares. By the sixteenth century, however, this stance was reversed—the buyer was expected at law to accept full responsibility for a sales transaction, while the seller was required to accept none. Under caveat emptor, the buyer was

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6 See I. Preston, The Great American Blow-up: Puffery in Advertising and Selling (1975) for details and additional documentation of the historical developments discussed in this section.

7 Anthony Fitzherbert is credited with laying down this principle in 1534 when he advised the would-be horse buyer: “If he be tame and have ben rydden upon, then caveat emptor.” A. Fitzherbert, Boke of Husbandrie, § 118 (1534).
supposed to rely upon and trust nothing but actual inspection; buyers and sellers were assumed to be equal; and suspicion of sellers' claims was elevated to a moral virtue of sorts.

Personal inspection is still a relevant and useful source of product information for the modern marketplace, yet under caveat emptor the average person was expected to have perfected the art to a degree unknown today. In a 1615 case,8 for instance, plaintiff Baily had agreed to transport defendant Merrell's load of wood, accepting Merrell's statement that the wood weighed 800 pounds. Only after two of his horses collapsed under the load and died did Baily discover that the true weight was 2,000 pounds. The court ruled that the loss was his own folly, which could easily have been avoided had he checked the truth for himself. Quite likely Baily could have done so; the point, however, is that no share of blame was placed on the seller for what the court acknowledged to be a fraudulent claim. Nor was the possibility acknowledged that a buyer's initial proneness to be suspicious might be deflected by the barrier raised, psychologically if not physically, by the seller's urgings.

Serious impediments were ignored as long as it was technically possible for the buyer to inspect the goods. In 1805, for example, a buyer in Connecticut agreed to close a sale on land in Virginia on the basis of the seller's description, without making the rather arduous 500 mile trip to the land. The unfortunate buyer, who later discovered that the property was virtually worthless, lost his case on appeal. The court unsympathetically concluded that the doctrine of caveat emptor applied: "The purchaser can see, if he will but look."9

Caveat emptor was based in part on the assumption that buyers and sellers were equal in ability to calculate the true value of commodities. A rising belief in the intelligence of the common man pervaded the works of political philosophers of the day, such as John Locke.10 And if the average man was deemed able to partici-

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10 John Locke (1632-1704), strongly believed in democratic rule and personal freedom:

Freedom of men under government is to have a standing rule to live by, common to everyone of society, and made by the legislative power; to follow my own will in all things, when the rule prescribes not, and not to be subject to the inconstant, uncer-
pate in self-government, then it followed that he could certainly handle himself perfectly well when buying a horse or an acre of land.

The assumption of equality was carried forward by later utilitarian thinkers such as John Stuart Mill, who developed a free speech theory based on the ability of human beings to separate truth from lies in the "marketplace of ideas." And, the notion of perfect equality between individual sellers and buyers still has some influence in the modern marketplace model, which assumes that a state of competitive equilibrium will occur only when no one individual buyer or seller has the power to affect price.

Court opinions of the time often elevated to a moral virtue the underlying imperative of caveat emptor, i.e., the need for buyers to distrust sellers' claims. In holding that a prospective purchaser of imported wood should not have trusted the invoice describing the quality of the ship's cargo, for instance, an American judge stated that the application of caveat emptor would rightfully "excite that caution and attention which all prudent men ought to observe in making their contracts." One had to be distrustful in the marketplace in order to be a good citizen, and, in the eyes of the law, a reasonable man. It was true then as it is now, however, that buyers engaged in face-to-face dealings with merchants sometimes feel uncomfortable in implicitly accusing the seller of lying. The doctrine of caveat emptor made no exceptions for such interpersonal realities.

Even at the height of caveat emptor, however, there were two types of legal actions that could create an obligation in sellers to stand by their claims. First, a buyer could sue for a breach of warranty if the seller had used specific terms such as "I warrant" or "I promise" or "I guarantee." Second, if the purchaser could prove that the seller knowingly made a false statement with a conscious intent to deceive, then an action for fraudulent misrepresentation would be recognized.

Although superficially representing a willingness to pull back on

2. Mill's free speech theory and its implications for the regulation of commercial speech are discussed at notes 85 & 86 and accompanying text infra.
the severity of caveat emptor, the real significance of these two qualifications in the rule’s early centuries lay in their absence of application. To escape warranting, the seller had only to avoid the enacting incantation and hope that the buyer would not demand it. Buyers, apparently not having fully learned the lessons of distrust, generally let the opportunity pass. The charge of fraud was even easier to avoid because the burden of proof was typically impossible for the buyer to meet.

In addition, a corollary called the “rule of obvious falsity”\(^\text{14}\) held that a clear falsehood could void the concepts of warranty or fraud. This might have been a relatively innocuous matter if it had applied only to cases where a potential buyer examines a three-legged horse while listening to claims about its speed or power. In early times, however, what was called “obvious” was typified more by a case in which the plaintiffs bought a claimed fifty acres that was actually only twenty-eight. They lost their case for misrepresentation because the facts were “obvious” (i.e. could have been obtained by measurement) despite the presence of snow and other impediments.\(^\text{15}\)

**B. The Age of Consumerism**

At the beginning of the caveat emptor period, commodities were fairly simple and most citizens were quite knowledgeable about them. Buyers were just as familiar as sellers with such common processes as growing grain or milling lumber. As the twentieth century began to produce complex goods with hidden ingredients or components comprehensible only to scientists, however, this assumption of buyer/seller equality began to erode.

The ancient obligation to distrust began to be questioned. The very complexity of goods made trust mandatory because of the increasing barriers to thorough inspection. In addition, manufacturers who invested heavily in creating national markets for new brands may have needed to encourage trust in order to gain wide acceptance in an increasingly impersonal marketplace. Indeed, the

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\(^{14}\) The rule still exists in modern tort law. See Restatement (Second) of Torts § 541 (1964): “The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious.” The appended comment notes, however, that falsity is now deemed legally obvious only if it may be determined by a “cursory inspection” or a “cursory glance.”

\(^{15}\) Gordon v. Parmelee, 84 Mass. (2 Allen) 212 (1861).
need to establish national advertising as credible resulted in a drive for adoption of state false advertising laws by the trade journal *Printer's Ink*.16

Finally, at the turn of the century, public policy began turning away from pursuing the growth of trade as a paramount goal. The bulk of the American public who at first had participated in the industrial society only as production workers began to participate as consumers to a much greater extent.17 Consumer protection began to emerge as a societal goal.

Once these marketplace and societal changes occurred, the legal actions of warranty and fraudulent misrepresentation began to be applied more liberally in favor of buyers.18 Any statement of fact or promise made by the seller about the goods came to be regarded as a warranty under the law, which was buttressed by "implied" warranties of merchantability and the like.19

Misrepresentation law also took a consumerist turn. The definition of fraud was widened to include not only knowing falsity, but also knowledge that one did not know whether the claim was true or false. Negligence was added as another basis for misrepresentation. It might be charged that a seller who honestly believed the claim was true, nonetheless ought to have known of the falsity because of knowledge or experience with the product that the buyer could not be expected to share.

The most significant consumerist development of misrepresentation law, however, was its transformation into statutory law by virtue of the FTC Act of 1914.20 Under common law, the individual consumer not only had to prove that the seller made the subject claim either fraudulently or negligently, but also had to prove that the consumer:

1. had received the seller's claim;
2. had understood it as conveying a fact later found to be false;

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18 See Preston, supra note 6, at 58-59, for details and additional documentation of the historical development discussed in this section.

19 U.C.C. §§ 2-313-2-316.

had relied upon the claim to be true;
(4) had been justified in his/her reliance; and
(5) had been damaged by believing the false statement.\textsuperscript{21}

The FTC, on the other hand, could bring unfair competition actions\textsuperscript{22} against sellers using false claims, without having to establish any of the above points with regard to any particular buyer. More sellers’ claims became legally actionable, as a result of the ability of the FTC to represent the collective interests of buyers.

Thus, the caveat emptor rule has largely been put to rest in the modern marketplace. Its origins will be seen to share a common heritage with first amendment theory, however, which has only recently been applied to commercial speech and which, as will be shown later, holds the potential for expanding the scope of FTC information remedies based on the ideal of free and open debate of nondeceptive claims in the marketplace.

Traces of the caveat emptor doctrine remain in FTC law as well. The next sections will show that these last vestiges of the ancient rule may have contributed to the apparent tendency of advertising to emphasize subjective appeals at the expense of objective data.

C. Immunity for Opinions and Exaggeration: the Residue of Caveat Emptor in FTC Law

A common theme that runs throughout the history of advertising regulation, from caveat emptor to the present day, is that opinions, as opposed to factual representations, should be left alone by the law. A buyer who today relies on a seller’s subjective claim, therefore, is in virtually the same position as the prospective horse buyer of the sixteenth century—i.e., there will be no legal protection if the seller’s claim turns out to be unfounded. Both the common law doctrines of warranty and misrepresentation, as well as the FTC’s developing definition of capacity to deceive, have traditionally been applied to objective statements only. Each of these strands of legal development will be examined below.

Early English cases refused to recognize a cause of action for misrepresentation based on a subjective claim because opinions


\textsuperscript{22} The FTC’s jurisdiction was expanded in 1938 to include unfair and deceptive trade practices, as well as unfair methods of competition. Wheeler-Lea Amendment of 1938, 16 U.S.C. § 45 (1976).
were not deemed to be subject to truth or falsity. A seller's assessment of value, such as "this property is worth 150 dollars," was not subject to legal review because it was the type of statement of which men will be of many minds, and which is often governed by whim and caprice. Judgment or opinion, in such cases implies no knowledge.

The law presumed there was no way of determining whether the differing opinions of buyers and sellers were other than equally correct. Opinion statements were deemed legally nonfraudulent even when spoken with conscious intent to deceive. Thus a seller could, without danger of legal redress, tell a buyer that he (seller) thought a piece of property was worth so much, knowing full well that he had paid much less. Or, knowing that a number of established experts had decided an object was worth $100, a seller could fearlessly express an opinion to a potential buyer that the buyer value was $200. Because such statements were "merely" opinions, the intent to deceive was irrelevant, and the claim was legally untouchable.

When a seller expresses an opinion on value, however, there may be an implied factual claim. It could be assumed by a reasonable buyer, for instance, that the seller based his opinion of value on specific offers by others to buy the product, on a consensus of expert opinion, or on the going market price. If the seller knows that the implied factual basis (e.g., the offers to buy, expert consensus or going price) contradicts his proffered opinion, then there is a conscious intent to deceive on the facts, and not simply an exaggerated opinion. Yet the opinion rule, as applied by the courts, did not consider the possibility of such implied factual claims.

The opinion rule defied even the logic of caveat emptor, which was based on the assumed opportunity of the buyer to inspect. With opinion statements, the courts came to assume as a matter of

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23 See Preston, supra note 6, at 90-119 & 175-191, for details and additional documentation of the historical developments discussed in this section.


law that the reasonable behavior of a buyer would be to discount and ignore such statements entirely. The courts made this assumption with no empirical basis whatever for the expectation that buyers would behave this way. Advertisers, on the other hand, could simply examine their sales figures to reach the opposite conclusion that buyers are indeed paying attention to the persuasive appeal of opinion.

The FTC continues to assume that many opinion claims, in the form of exaggerations or “dealer's talk” known as “puffery,"27 have no capacity to deceive. In its early years the Commission showed a strong inclination toward regulating such claims, but the courts of appeal reversed on several occasions, citing in puffery's favor the early English cases that distinguished opinions from facts.28 Since the 1940's the FTC has abandoned any attempt to challenge systematically that ancient doctrine, but has examined puffing defenses on a case-by-case basis, rejecting the defense for claims that imply that they are capable of objective measurement, or which appear particularly credible to consumers.29

Recent empirical evidence has shown, however, that advertisements normally characterized as harmless puffery may in fact have a significant potential for serious deception.30 While the use of Commission resources to police false claims believed only by a credulous few would be questionable, the Commission and the academic community should conduct research to determine whether apparently innocuous puffing has the capacity to deceive substantial numbers of consumers to their detriment.

Puffery and opinion statements are not the only types of sellers' claims that avoid the literal expression of facts. Prominent in the advertising of the 1970's are at least two other types of expression

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27 One FTC case defined puffery as:
   exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined.
28 See, e.g., Carlay Co., 39 F.T.C. 357 (1944), rev'd, 153 F.2d 493 (7th Cir. 1946); Kidder Oil Co., 29 F.T.C. 987 (1939), rev'd, 117 F.2d 892 (7th Cir. 1941).
that are nonfactual: social-psychological claims and nonverbal images. Both are modern creations. Although conveyable by other media, they have increased tremendously in scope and volume because of the development of television. These forms were not dealt with explicitly in early law, but the justification for the Commission's "hands-off" approach appears to stem from the same rationale that was developed to protect opinion claims in an earlier era.

"We don't sell lipstick," cosmetic tycoon Charles Revson is reported to have said, "we sell hope." Such intangible qualities (e.g., "Coke adds life") constitute "social-psychological" claims because the advertised quality (the "life" in Coke) is not a physical property of the product but must be supplied by the consumer (e.g., by drinking Coke at a lively party). Cigarette ads may imply that the user will feel as macho as the Marlboro man or as attractive and independent as the Virginia Slims woman, but of course such feelings exist only within the individual's psychological makeup and are not inherent in the product. On the other hand, the consumer who feels more virile from smoking Marlboros or more attractive and independent by purchasing Virginia Slims has received some value from the advertisement. By the same token, however, a purported but worthless cancer cure may have the valuable effect of relieving the user's anxiety about the disease, but could seriously mislead a consumer who relies on it to the exclusion of other more effective treatments.

Advertisers assert that their social/psychological associations are not meant to be factual and that no one would take them as being literally true. The Commission rejected this type of defense in the "Vivarin" case, however, in which an ad for a stimulant tablet was alleged to imply falsely that the drug would make a person more attractive to the opposite sex, contribute to a happy marriage, improve one's sex life, etc. The advertiser agreed to stop making these claims. A gasoline ad that exploited the public's anxieties about pollution was also prohibited.

More typical of the FTC's approach, however, was the rejection

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of complaint allegations that Wonder Bread advertising tended to exploit children's aspirations for rapid and healthy growth, as well as their parents' concern for their children's growth and development. Thus, social/psychological claims could be a further remnant of caveat emptor in modern FTC practice. Research into the effects of such claims, and their actual capacity to deceive, should be pursued.

Many social/psychological and other advertising claims are made strictly without words—the pictorial elements, music, graphics or general "vibes," convey the desired image. These non-verbal advertising messages may be absorbed by consumers in a different manner than verbal messages, however, and thus bypass the normal rational evaluation of more explicit advertising claims. No one has yet developed a method for proving whether nonverbal images are deceptive or unfair. Only when the pictures misrepresent literal facts (e.g., a faked demonstration, or a man in a white coat who is not really a doctor) or depict children engaging in unsafe conduct has the Commission acted based on nonverbal content. Further research and study to understand nonverbal forms of communication might be well advised given the apparently increasing prevalence of nonverbal claims. Otherwise, they will effectively remain in the realm of caveat emptor.

D. Trend Toward Nonfactual Appeals in Advertising

Advertising in general consists of both objective facts and subjective, persuasive elements. The preceding historical development suggested that regulatory efforts have focused on the objective aspects of ads, while leaving buyers on their own with respect to

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35 Harburger, Commercial's Vibes May Say Opposite of What's Intended, ADVERTISING AGE 57 (Feb. 12, 1979).
36 Just recently, however, an Administrative Law Judge held that certain Anacin ads were legally "deceptive," in part because the pictures and sound track conveyed the false impression that Anacin was "good for tension, nerves, stress, fatigue and depression and helps one to cope with the ordinary stresses of everyday life . . . ." American Home Products Corp., Initial Decision of Presiding Officer, FTC Docket 8918 (Sept. 1, 1978).
37 See generally E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 347-60 (1971).
38 See Uncle Ben's, Inc., 89 F.T.C. 131 (1977); Mego Int'l, Inc., 3 TRADE REG. REP. (CCH) ¶ 21,389 (July 14, 1978). See also AMP, Inc., FTC File No. 782 3025 (July 9, 1979) (consent agreement).
opinion, emotional associations and nonverbal imagery. The trend toward the subjective in advertising has been spurred by a combination of economic and legal forces. A discussion of these factors, as well as suggestions for new regulatory approaches to promote a better balance between facts and persuasion, will follow.

At the height of the caveat emptor era in America (basically the nineteenth century), sellers apparently did not distinguish between giving consumers objective information and motivating them to buy. They seemed to recognize only two choices—provide truthful information or provide false information.

For a long time it was a sufficient set of choices. False information was not under great risk of being caught and prohibited by a regulatory scheme based on caveat emptor. And there was not a great risk that consumers would recognize false claims, the high hopes of the Enlightenment philosophers notwithstanding. Nor, in any event, was false information the only alternative. True information could often be highly persuasive at a time when there were so many newly invented products and when supply had traditionally been unsuccessful in keeping up with demand.39

In the 1800’s, the Industrial Revolution and mass production required new markets for the commodities churned out by fledgling factories. Wage-earners had to become consumers.40 Products once produced only locally, such as bread, came to be produced and distributed nationally by large firms. The items that many companies produced became standardized into “brands” of a product rather than “the” product. Oversupply replaced overdemand as the more typical feature of the marketplace. The problem to be solved by advertising was to differentiate substantially indistinguishable brands so that the public would come to see them as being distinct.41

Factual information in this situation was at a disadvantage. Because many brands were not significantly different, the promotion of these slight differences or nondifferences could scarcely solve the problem. False information was a viable alternative, but as the market undertook to differentiate brands in earnest, caveat emptor

40 See Ewen, supra note 17.
41 See Potter, supra note 39.
was supplemented by stiffer forms of regulation. Consequently, sellers began to realize that there was another reasonable choice: nonfactual information. Puffs, social-psychological claims, and nonverbal images could distinguish a brand from its competitors when facts about tangible product attributes could not.

Sellers turned more and more to subjective appeals, a course of action made easier because these claims were significantly immune from legal challenge. Indeed, it could be said that FTC insistence on strict factual accuracy in advertising created an incentive for advertisers to use "nonfacts" to sell goods and services.

Put another way, the risk of an FTC order or a prolonged court battle can be viewed as a "cost" placed on purely factual advertising—and an incentive to use techniques not likely to attract government attention. Factual claims which the advertiser felt were perfectly true were still risky in the sense that the regulators might disagree with the assessment, and even a successful defense can be expensive. Thus, the economically rational seller would naturally prefer ads which were both effective sales vehicles and free from the risk of litigation. Ironically, then, drive for consumer protection through the regulation of false advertising claims may have accelerated the shift away from objective data in advertising, thus lowering the potential value of advertising as a source of hard product information for consumers.

This is not to say that the FTC should abandon its efforts to police false objective claims. On the contrary, factual misrepresentations by sellers could very well lead consumers to misallocate their resources by making purchase decisions that fail to fulfill their own preferences most efficiently. Thus the traditional regulatory focus is a necessary foundation for consumer protection, but it may not be a sufficient means of assuring adequate information in the marketplace.

The lopsided regulatory pressures which may in part have caused the shift toward subjective claims could be equalized somewhat by giving such claims a closer legal scrutiny. Empirical evidence and case-by-case testing may show that some examples of puffery, social/psychological claims or nonverbal images are actually conveying implied factual messages which are deceptive, and which result in consumer injury. Surveys could be conducted to determine what meanings consumers actually derive from the total advertisement, including nonverbal aspects. Such surveys could be
used either in deceptive advertising cases or in ad substantiation requirements (i.e., the advertiser would have to establish what claims are being received by consumers in order to substantiate them).42

Another approach would be for the FTC to compel advertisers to disclose more objective information through various remedies for deception or unfairness. Affirmative disclosures and corrective advertising remedies for deception have had this effect in the past. New initiatives based on unfairness theory43 may also require the provision of material facts based on the imbalance of resources available to sellers and buyers. FTC remedies which increase the amount of information available to consumers will be discussed next.

II. FTC Remedies Increase Consumer Information

A. Deception Remedies

The FTC has traditionally used remedies for deception which could potentially increase the total amount of information in the marketplace, such as affirmative disclosures.44 This approach, which has gained momentum in the past ten years at the Commission, supports the marketplace notion that more information is better than less.45

42 While there are many unresolved issues that will be raised if the Commission or any other regulatory body were to attempt to tackle the area of nonverbal advertising claims, the suggestion here is that significant deception resulting in serious harm to consumers should be scrutinized, whether the claim is communicated through words or images.

43 The FTC Improvements Act of 1980 put a three year moratorium on the Commission's authority to promulgate industry-wide rules regarding unfair advertising. This provision does not affect the FTC's authority to litigate individual cases based on unfair advertising or to promulgate rules based on other types of unfair trade practices. Pub. L. No. 96-252, ___ Stat. __ (approved May 28, 1980).

44 Although the following discussion focuses on the two main prongs of FTC jurisdiction, namely deception and unfairness as defined by Section Five of the FTC Act, it should be noted that Congress has expanded the Commission's duty to ensure that consumers receive appropriate information through various statutes directing the Commission to require that business provide specific facts on labels or in contracts. Wool Products Labeling Act of 1940, 15 U.S.C. §§ 68-68g(j) (1976); Textile Fiber Products Identification Act of 1958, 15 U.S.C. §§ 70-70k (1976); Fair Packaging and Labeling Act of 1966, 15 U.S.C. §§ 1451-61 (1976); and Consumer Credit Protection Act of 1968, 15 U.S.C. §§ 1601-81(t) (1976).

The Commission has long recognized that deception is not limited to outright lies, but can also stem from "half-truths," that is, claims not literally false but which give false impressions. The general approach has been to attempt to cure this type of deception through disclosures. The first volume of FTC Reports, for instance, contained affirmative disclosure cases in which M&J Coffee had to reveal that it was not composed of mocha and java, and "Manchurian Linseed Oil" had to be labeled as "not imported." In later cases, the Royal Milling Company had to reveal they were "not grinders of wheat," and the makers of "Alpacuna" and "Cashmora" had to list their constituent materials conspicuously, which included neither vicuna nor cashmere. A producer of an iron supplement, if making claims of relief for "tiredness," had to disclose that its products would only relieve tiredness for a small minority of those affected. In a more recent case, a company which presented a one-sided opinion on a matter of public controversy was ordered to disclose in future statements on the topic that "there is a controversy among the experts and [the company] is presenting its side of that controversy."

The disclosures in this category tend to be "triggered" by a particular misleading claim or trademark, however, leaving the seller the option of avoiding the disclosure by changing the claim. Thus the remedy may not increase information at all if there is a viable alternative for the seller.

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48 FTC v. Royal Milling Co., 288 U.S. 212 (1933). (Supreme Court modified FTC orders which would have stricken the word "milling" from the trade names of companies which resold flour, but did not mill it themselves).
49 Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946) (reversed Commission order requiring excision of "Alpacuna" trade name, Commission on remand concluded that disclosure of all materials was sufficient remedy); Elliot Knitwear, Inc. v. FTC, 266 F.2d 787 (2d Cir. 1959) (Commission excision of "Cashmora" label overturned in favor of disclosure of all materials).
50 J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967). The Williams case effectively overruled an earlier D.C. Circuit decision which had reversed a Commission order requiring a virtually identical disclosure for a similar preparation. See Alberty v. FTC, 182 F.2d 36 (D.C. Cir. 1950). The majority opinion in Alberty said that the FTC Act's "purpose and terms are to prevent falsity and fraud, a negative restriction." Id. at 39. Judge Bazelon in dissent said that the purpose of the FTC Act was "to encourage the informative function of advertising . . . ." Id. at 45 (Bazelon, J., dissenting). Bazelon's more expansive interpretation appears to be the prevailing view today.
51 Nat'l Comm. on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1978).
The Commission also established in some of its first disclosure orders the legal principle that deception by omission can stem from consumers' basic assumptions about products, as well as from claims which contain misleading implications. For instance, the mere advertising of a product can raise the assumption in the minds of consumers that the product is new. Thus, early FTC cases ordered that ads for used typewriters, recycled oil, and retitled movies had to disclose clearly the second-hand nature of the goods.

The deception by omission theory received the Congressional stamp of approval in 1938. The Wheeler-Lea amendments defined false food and drug advertisements to include failure to reveal material facts regarding the consequences of using the product in either the customary manner or under the conditions prescribed in the ad.

In the years following Wheeler-Lea, the Commission issued a spate of orders requiring disclosure of health risks or other shortcomings of various home remedies. For instance, sellers of baldness preparations were required to reveal that their treatment would not work "in the great majority of cases."

Deception by omission theory tends to support the requirement of health warnings or other information in all ads for a particular product, whether or not the ad makes a health-related claim, because the deception flows from what people assume about the product (e.g., that there are no serious health risks), rather than a specific claim. Unlike the "triggered" disclosures discussed above, the disclosures required for deception by omission are likely to result in more information because the advertiser does not have the option of avoiding disclosure by eliminating a particular misleading claim.

Corrective advertising is also a disclosure remedy for deception,

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52 FTC v. Typewriter Emporium, 1 F.T.C. 105 (1918).
54 FTC v. The Lasso Pictures Co., 1 F.T.C. 374 (1919).
56 E.g., American Medicinal Prod., Inc. v. FTC, 136 F.2d 426 (9th Cir. 1943) (obesity preparation); Aronberg v. FTC, 132 F. 2d 165 (7th Cir. 1942) (remedy for delayed menstruation).
57 Keele Hair & Scalp Specialists v. FTC, 275 F. 2d 18 (5th Cir. 1960); Ward Laboratories, Inc. v. FTC, 276 F. 2d 952 (2d Cir. 1960).
but the theoretical basis for imposing it is somewhat different. This remedy essentially seeks to counteract “lingering” false beliefs in the minds of consumers which were created by past advertising. Corrective advertising thus far has been applied mainly in cases involving outright misrepresentations of fact, rather than half-truths or omissions.

The *Warner-Lambert* or “Listerine” case was the first corrective advertising order to be approved by the courts. Many years of promotion for Listerine mouthwash had fostered a lasting but erroneous impression in the minds of consumers that Listerine was effective in preventing or treating colds. The FTC’s requirement that the company not only cease making the false claim but also add a disclaimer in future advertising was upheld.59

As the court aptly pointed out in *Warner-Lambert*, the concept that disclosures may be necessary to correct the effects of past advertising was not new at the FTC, but had a firm foundation in legal precedents. For example, in the first decade of its existence, the Commission was faced with the case of a baking powder company that for sixty years had stressed that its product was superior because it contained cream of tartar rather than phosphate. When the company finally switched to phosphate, the mere cessation of the claims and the elimination of “cream of tartar” from the label was not sufficient to eradicate consumers’ preconceptions about this brand of baking powder. The Second Circuit upheld an extensive series of disclosures, including the mandatory use of the word “phosphate” as part of the name of the product, because of the effects of past advertising.60

In a more recent case, an established Massachusetts clock company which had built a reputation for 150 years, sold its trade name to a different corporation which began to import clocks from Europe for resale in the United States. The FTC ordered disclosures to correct the lingering belief that the clocks sold under the trade name were the same Massachusetts clocks.61 Corrective advertising has been included in at least ten consent orders dating

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59 *Id.*
60 *Royal Baking Powder Co. v. FTC*, 281 F. 744 (2d Cir. 1922).
back to 1971. In another matter, a manufacturer agreed to pay for advertisements announcing the imposition of substantial civil penalties for making claims the FTC alleged were unsubstantiated.

Corrective ads are by definition limited to cases in which it is necessary to cure past deception, and thus do not directly contribute to promoting increased information with regard to future claims. Nonetheless, this remedy serves the useful function of providing consumers with more and better information by clearing up past misperceptions.

B. Standardized Disclosures—Facilitating Comparative Choice

Disclosure of relevant product information may at times not be sufficient to give consumers the opportunity to make intelligent purchase decisions. If a characteristic, such as the power of hi-fi equipment, is disclosed by different companies using differing units of measurement, then comparative decisions will obviously be more difficult. Failure to use a common measurement could thus be an unfair or deceptive practice. The Commission now requires all hi-fi power claims to use a standard measurement.

Historically, the Commission has favored the remedy of “standard-setting” to enhance the quality of product information received by consumers. Assuming underlying deception, unfairness or other statutory violation, the Commission could set standards for sellers’ claims in three basic ways:

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62 See Amstar Corp., 83 F.T.C. 659 (1973) (Domino sugar not unique source of strength, energy, and stamina); Boise Tire Co., 83 F.T.C. 21 (1973) (Boise tires not rated by government); ITT Continental Baking Co., 79 F.T.C. 248 (1971) (Profile bread not effective in weight reduction); Lens Craft Research and Dev. Co., 84 F.T.C. 355 (1974) (Burnor contact lens cannot be worn while sleeping); Matsushita Elec. of Hawaii, 78 F.T.C. 353 (1971) (Panasonic television sets have not passed tests for fire and explosion hazards); Ocean Spray Cranberries, 80 F.T.C. 975 (1972) (Ocean Spray Cranberry juice does not contain more vitamins and minerals than tomato or orange juice); Pay Less Drug Stores Northwest, Inc., 82 F.T.C. 1473 (1973) (safety helmet has not met safety standards); Sugar Information, Inc., 81 F.T.C. 711 (1972) (research has not established that consuming sugar before meals will contribute to weight reduction); Wasem’s Inc., 84 F.T.C. 209 (1974) (Wasem’s Super B Vitamins not needed by most consumers); Yamaha Int’l Corp., 86 F.T.C. 973 (1975) (corrective letter required to the effect that a motorcycle is not as safe as an automobile).


64 16 C.F.R. § 432 (1980).

65 This section discusses “standard-setting” solely with regard to claims made about marketplace commodities rather than minimum production requirements for products.
(a) by standardizing the definition of terms;
(b) by establishing a single metric for measuring a particular product attribute; and
(c) by establishing a grading system for categorizing scores on the metric.

a. Standardizing Definitions

The Commission has standardized definitions of product types on numerous occasions. Some examples are the standard definitions for types of wood used in household furniture (e.g., "walnut" describes "genuine solid walnut of the genus juglans") and the label requirements for fur and textile products (e.g., "wool" means the "fiber from the fleece of a sheep or lamb. . . ."). Once a standard definition is set, sellers cannot use that term to describe their product unless it qualifies under the standard definition. Thus, walnut veneer cannot be described as "walnut" without an appropriate qualification. This type of standard setting is most appropriate when terms are used by sellers in conflicting and confusing ways.

b. Establishing a Metric

A "metric" is a scale or method for measuring a product attribute. The standardized definitions discussed above are actually metrics with only two points. Thus, a fabric is either "wool" or not "wool;" a wood is either "walnut" or not "walnut." Metrics can also be continuous, however. R-value, for instance, is a measurement of insulating value which can range from high to low within a specific numerical scale.

Many of the pre-Magnuson-Moss trade regulation rules established uniform methods for measuring product attributes when differing measurements were possible. Thus, before the Commission required all television sets to be measured along the diagonal of the screen, differing methods of measuring screen size could be used, which could result in misleading some consumers. The length of extension ladders was standardized to mean the maximum usable length, whereas previously some sellers were using the total

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length of the various sections without discounting for overlap.\textsuperscript{69} Other examples in this category include standard measures for luminescence of light bulbs,\textsuperscript{70} fuel economy ratings for gasoline,\textsuperscript{71} and power output of home entertainment amplifiers.\textsuperscript{72} The Commission also established a standard measure for tar and nicotine content of cigarettes, but in this instance, the Commission performs the measurement in its own laboratory.

In each case where a standard measurement system is established, the Commission requires that any advertiser wishing to make claims about the attribute must use the standard measure. In some instances, the use of other descriptive terms is permissible, as long as the standardized measurement is also clearly disclosed.\textsuperscript{73}

c. Grading Systems

A grading system divides the metric for measuring product attributes into discrete categories, or grades. Thus, if the numerical scores for R-value (the insulating capacity of home insulation) were divided into three categories called “high,” “medium” and “low,” then the continuous metric would become a grading system.\textsuperscript{74} Grading could be appropriate to provide consumers with a frame of reference to categorize high, low or medium scores on the metric.

d. Standard-setting as a Less Restrictive Remedy

Standard-setting as it is practiced by the Commission has the advantage of ensuring that commercial claims are made in a truthful and non-misleading manner, while not unduly restricting the total flow of nondeceptive speech in the marketplace. Although standard-setting invariably involves a prohibition on claims which do not meet the standard, it is nonetheless a relatively non-restrictive remedy provided the standard is set properly.

\textsuperscript{69} 16 C.F.R. § 418 (1980).
\textsuperscript{70} 16 C.F.R. § 409 (1980).
\textsuperscript{71} 16 C.F.R. § 259 (1980).
\textsuperscript{72} 16 C.F.R. § 432 (1980).
\textsuperscript{73} 16 C.F.R. § 418 (1980).
\textsuperscript{74} E.g., Deceptive Advertising and Labeling as to the Length of Extension Ladders, 16 C.F.R. § 418 (1980).
\textsuperscript{75} This example is purely hypothetical. The final version uses a continuous metric for R-value, not a grading system. 44 Fed. Reg. 50218 (1979).
Standardizing the definition of “natural,” as proposed in the Food Advertising Rule, for instance, is less restrictive than disclosures or a ban on “natural” claims.\(^7\) Assuming that the definition is reasonable, those sellers whose food qualifies as “natural” (no artificial ingredients and minimal processing) will be able to make that claim without having to counter other “natural” claims which use a different standard. A disclosure requirement (i.e., anyone could claim “natural” as long as they disclosed the artificial ingredients and processing) would place an extra burden on advertisers who wanted to use the term. And obviously, a ban on the word “natural,” while it would eliminate deceptive and confusing usage of the term, would be more restrictive of speech than simply standardizing the definition. That is to say, if a standardized definition does not arbitrarily exclude truthful claims or unwittingly permit deceptive ones, then the flow of truthful claims will be maximized and only misleading or deceptive claims will be excluded.\(^6\) Similarly, if the metric provides an objective and reliable measurement which does not arbitrarily exclude more accurate measurements, then truthful claims will be facilitated.

By requiring that sellers disclose certain information, and by standardizing the meanings of terms or methods of measurement used by sellers, FTC remedies for deception and unfairness have the concomitant benefit of improving the information available to consumers for making marketplace decisions. The extension of some measure of First Amendment protection to commercial speech provided a further impetus for FTC remedies which increase information, as will be discussed next.

### III. First Amendment Marketplace of Commercial Ideas

The recently extended First Amendment protection of commercial speech\(^7\) provides justification for broadening the scope of FTC information remedies. While free speech scholars have traditionally adopted a strong stance against government intervention, First Amendment protection for commercial speech has been limited

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\(^7\) The Food Advertising Rule (Phase I) had been proposed originally to require the disclosure of the definition of “natural” each time it is used. 40 Fed. Reg. 89800 (1976). The final staff proposal relied solely on standard-setting.

\(^6\) See American Frozen Food Inst. v. Matthews, 555 F.2d 1059 (D.C. Cir. 1977) in which standard-setting for label descriptions by the FDA was upheld.

\(^7\) See note 5 supra.
from the outset by the Court's express recognition of the propriety of regulation for deception. In fact, both FTC regulation and First Amendment law stem from the same heritage of freedom inherent in the classic laissez-faire model of economics. First Amendment theory uses the marketplace as a metaphor for competition in ideas. FTC law, from its inception, has been squarely based on a Congressional mandate to promote competition in the marketplace of goods and services. The extension of free speech protection to advertising thus opens up the possibility of applying the marketplace model (long established in analyzing political speech) to the commercial sphere.

There is no direct evidence that the framers of the Bill of Rights had a "laissez-faire" theory in mind when they drafted the First Amendment, although Adam Smith's Wealth of Nations, the seminal work of "laissez-faire" economics, was published in the same year as the Declaration of Independence and was widely read. In addition, Smith's theory had a profound influence on both political philosophers and Supreme Court Justices of later years as they considered free speech issues.

Smith's basic insight was that the collective decisions of many buyers and sellers, each behaving in his or her own self-interest, would result in the provision of those goods that society wanted in

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78 The marketplace theory of free speech, discussed in more detail below, is not the only theory which has informed the Supreme Court's interpretations of the first amendment. Other values which are protected by the first amendment include: (1) individual self-expression, see T. Emerson, The System of Freedom of Expression (1970); (2) a free exchange of information necessary to obtain consensus in a system of self-government, see A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); and (3) a press that is free from censorship so that it may fulfill its role as a check on oppressive government, see generally 1 Z. Chafee, Government and Mass Communication (1947).

79 Indeed, until 1938, protection of competition was the only mandate to regulate unfair and deceptive trade practices. Wheeler-Lea of 1938, 15 U.S.C. § 45 (1976).


81 In fact, there is very little "legislative history" to support any of the later interpretations of the First Amendment. See L. Levy, Legacy of Suppression 4 (1960).
the quantity it desired and at the prices society was prepared to pay. In other words, individual strivings would unconsciously promote collective interests due to guidance from an "invisible hand." There was no need for government regulation because the forces of supply and demand would set prices at an optimal level in a perfectly competitive marketplace.

Microeconomists, who later developed Smith's theories, make a number of assumptions in defining the ideal of perfect competition. First, all participants in the market will behave "rationally," to maximize their economic interests. Second, there will be a sufficient number of buyers and sellers so that no one economic actor can independently affect a product's price. Third, all buyers and sellers will have perfect information about all relevant aspects of each transaction.

Of course, these assumptions are not a perfect fit in the twentieth century economy. Human beings are motivated by psychological and cultural factors which do not necessarily coincide with material well-being. Economic concentrations such as oligopolies and monopolies are common features in the modern economy. Thus, some sellers may indeed be able independently to affect the price of goods. Finally, and most importantly, market participants in the twentieth century must often make decisions on the basis of less than perfect information. Modern marketing has created a proliferation of complex products which feature a multitude of variations, thus complicating the demand/supply equation, and increasing the cost of obtaining relevant information.

Because the assumptions of the perfect competition model are not satisfied in real-world markets, antitrust intervention may be necessary at times. Ironically, such intervention in the modern economy is designed to achieve goals of the laissez-faire economists, who wanted to preserve the free functioning of the market.

The ideal of the competitive marketplace has pervaded other aspects of American life. It provides one of the philosophical bases

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84 For a discussion of why the private market has failed to produce an adequate amount of information about goods and services, see Gage, supra note 45, at 1042-49. See also Piftosky, BEYOND NADER: CONSUMER PROTECTION AND THE REGULATION OF ADVERTISING, 90 HARV. L. REV. 661, 665 (1977).
for the constitutional right of free speech. John Stuart Mill, the
nineteenth century utilitarian philosopher, was the first to use the
laissez-faire model as a basis for First Amendment analysis. Mill
theorized that in a system of democratic government, diverse opin-
ions must be allowed to compete in the marketplace of ideas in
order for "truth" to emerge.\textsuperscript{55} Mill argued that all ideas must have
access to the marketplace.\textsuperscript{86} No one "seller" of ideas would be able
to dominate because all speakers would have a forum. Viewpoints
from all sources, right or wrong, true or false, must be allowed to
come forward. The marketplace of ideas was to be self-enforc-
ing—false propositions would be countered by truth, without the
need for government involvement.

Supreme Court Justice Oliver Wendell Holmes later incorpo-
rated Mill's theory into constitutional law. In arguing against
government censorship through the application of seditious libel
laws, Holmes stated that

\begin{quote}
the best test of truth is the power of the thought to get itself
accepted in the competition of the market. \ldots\textsuperscript{67}
\end{quote}

This theme has been reiterated by other respected jurists. Judge
Learned Hand said that the first amendment

\begin{quote}
prosupposes that right conclusions are more likely to be gath-
ered out of a multitude of tongues, than through any kind of
authoritative selection.\textsuperscript{68}
\end{quote}

Justice Brennan ruled that the press must be allowed to publish
nonmalicious (albeit erroneous) statements about public figures
because of

\begin{quote}
a profound national commitment to the principle that debate
on public issues should be uninhibited, robust, and wide-
\end{quote}

\textsuperscript{55} Mill, \textit{On Liberty}, supra note 2, at 520-21. Seventeenth century poet John Milton pre-
saged Mill's view that truth would be victorious when put to the test: "Let [truth] and
falsehood grapple; whoever knew Truth put to the worse in a free and open encounter?" J.
supra} note 80, at 1-2.

\textsuperscript{56} Mill assumed that participants in the marketplace would be rational decisionmakers:
It is perhaps hardly necessary to say that this doctrine is meant to apply only to
human beings in the maturity of their faculties. We are not speaking of children.

\textit{Mill, On Liberty, supra} note 2, at 484.

\textsuperscript{67} Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

open. . .

Just as the marketplace of goods and services is now subject to government intervention to achieve free competition, regulation of one channel of speech, broadcasting, has been sanctioned by a First Amendment, pro-competitive rationale. The Federal Communications Commission (FCC) can require the broadcast media to provide a forum for diverse viewpoints because the scarcity of frequencies might otherwise dictate that the debate of public issues on the airwaves would be dominated by a relatively small number of speakers. In upholding the FCC's Fairness Doctrine, the Supreme Court noted:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

As discussed briefly above, it was not until recently that the protection of the first amendment was applied to speech relating to the marketplace of goods and services from which the marketplace of ideas theory was originally derived. Traditionally, the Court had considered commercial speech to be outside the zone of First Amendment protection, in the same way as obscenity and "fighting words."

In 1975, however, the Court struck down a Virginia statute which had criminalized the publication of an ad in a Virginia paper for an abortion referral service in New York. The opinion noted that an abortion ad was not a pure commercial transaction because it involved a constitutional issue which was clearly a matter of public interest. At least part of the rationale, however, rested on the Court's observation that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."

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93 Id. at 826.
Many doubts were resolved in the *Virginia Pharmacy* case the next year. The Court held unconstitutional a Virginia law prohibiting the advertising of prescription drug prices, in a decision which was squarely based on the principle that the free flow of information in the commercial sector is as much a part of First Amendment values as the robust and open debate of political issues. In fact, the Court surmised that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Harkening back to the Adam Smith "invisible hand" theory, the Court noted:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

The marketplace metaphor was no longer simply a metaphor. By recognizing that our society has a crucial interest in commercial as well as political information, the *Virginia Pharmacy* decision, after 200 years of history, allows a unified economic and first amendment analysis of commercial speech issues.

Just as modern economic and First Amendment theorists have conceded that government must sometimes tinker with market structure to achieve more competition, so too, the *Virginia Pharmacy* opinion recognized that the free flow of commercial speech was not incompatible with some forms of government regulation.

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95 The Court has noted in later cases, however, that commercial speech is not entitled to a "parity of constitutional protection" with political speech. Indeed, commercial speech occupies a "subordinate position in the scale of First Amendment values, . . . allowing modes of regulation that might be impermissible in the realm of non-commercial expression." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).


97 *Id.* at 765.

98 One article on the *Virginia Pharmacy* case has argued that drawing the line between permissible and impermissible regulation of commercial speech is difficult, if not impossible. Indeed, the authors argue that *Virginia Pharmacy* was wrongly decided because subsequent courts must make value judgments about "good" (non-regulatable) and "bad" (regulatable)
Time, place and manner restrictions, as well as "truth-in-advertising" laws were deemed acceptable. The Court saw no constitutional obstacles which would prevent the government from "insuring that the stream of commercial information flow[s] cleanly as well as freely." Later Supreme Court cases have allowed more restrictive regulation for certain types of commercial speech. The Court appeared to distinguish between objective information, such as price advertising, and more persuasive speech, such as in-person solicitation and trade names. The objective information, if nondeceptive, qualifies for a high level of first amendment protection, while other forms of commercial speech can be regulated more rigorously through broad-ranging prophylactic measures. While the FTC might want to adopt its own policy in favor of maximizing the flow of nondeceptive information, the Court stated explicitly that the choice of remedy for deceptive commercial claims is not necessarily limited for first amendment reasons to the least restrictive alternative.

In upholding a state ban on the use of trade names by opticians, the Court noted that there is no First Amendment rule, ... requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication.

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100 Id. at 772.
101 This "lesser degree" of first amendment protection should be limited to commercial speech, however, so that the long-standing tradition of near absolute protection for political speech will remain intact. See Roberts, Toward A General Theory of Commercial Speech and the First Amendment, 40 Ohio St. L.J. 115 (1979).
104 Ironically, as noted in the preceding section, FTC regulation has historically been more restrictive of factual claims, leaving the subjective aspects virtually untouched.
106 Friedman v. Rogers, 440 U.S. 1, 12 n.11 (1978).
The Virginia Pharmacy opinion, as well as subsequent commentators, have noted several reasons why commercial speech is a more appropriate target for regulation concerning accuracy than is political speech. First, a commercial advertiser will generally be in a better position to verify product claims than anyone else, consumers and competitors alike. Manufacturers may have “trade secrets,” whereas political candidates do not have an analogous “lock” on information. Most of the facts in political debates are in the public domain, and false statements will be quickly countered by opposing speakers. And to the extent that commercial claims are objective, they are more susceptible to empirical proof than political promises.

Second, the Court in Virginia Pharmacy noted that “the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.” Since producers will generally need to advertise in order to increase profits, requirements that facts be substantiated will probably not cause the stream of commercial information to dry up. Political advocates, on the other hand, especially those who speak for minority viewpoints, could be discouraged from speaking at all if required to certify the facts.

One would expect that competitors would have every incentive to expose the false claims of their counterparts, yet, in what may be a perverse market failure, one does not see a great deal of explicit debunking in the commercial arena. Only eight percent of all advertisements include direct confrontations with named competitors. There may be several reasons for this apparently low level.

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108 Id.
109 As discussed earlier, however, a regulatory focus on objective claims may cause some shift in advertising to subjective appeals.
110 Wilson, “Comparative Advertising: Some Current Considerations for Managerial Planning and Strategy,” in CURRENT ISSUES AND RESEARCH IN ADVERTISING 1978 5 (J. Leigh and
First, in markets with few sellers, costly advertising wars can be considered just as disadvantageous as price competition. Second, commercial misrepresentations are not likely to be corrected in the marketplace if the truth would disadvantage all sellers equally. No cigarette manufacturer, for example, had an incentive to tell consumers that cigarettes pose health risks. Regulatory action was necessary.

Advertisers shrink from direct countering for other reasons as well, such as:

- fear of lawsuits;
- evidence that naming competitors will be confusing to consumers and thus not as effective in selling products;
- an uneasiness about reducing "the advertising arena to the kind of mudslinging that has hitherto been the special preserve of politics."

Thus, commercial speech may be both more resistant to chilling by government regulation, because of the profit motive, yet less "self-correcting" than political speech for the reasons noted above.

Finally, political speech is the central concern of the first amendment. Regulation of commercial speech may not pose the same threat to our free democratic system as would government censorship of political ideas. The incumbent administration does not have a stake in the outcome of commercial debate in the same sense that it often does in the political arena. Thus, government can and should represent the interests of the entire electorate in a smooth-functioning market by promoting competition among nondeceptive speakers in the commercial sector. Any attempt to distinguish between dissenting opinion and factual error among

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C. Martin ed. 1978).


112 Congress in 1966 required that all cigarette packages distributed in the United States bear a health warning. 15 U.S.C. §§ 1331-40 (1976). In 1972, the FTC approved consent orders with the six major United States cigarette companies to extend the package warning to all cigarette advertisements. In re Lorillard, 80 F.T.C. 455 (1972).

113 See Ogilvy & Mather study of comparative advertising, summarized in ADVERTISING AGE 25 (July 5, 1976).

114 Andrew G. Kershaw, Chairman, Ogilvy & Mather, quoted in ADVERTISING AGE 25 (July 5, 1976).

115 See note 78 supra.
political speakers, on the other hand, would be a dangerous en-
croachment on liberty.

The First Amendment "marketplace of ideas" theory rests on
the notion that the constitutional guarantee of free speech means
that public debate should be "wide open" and "robust,"\textsuperscript{118} with
ideas and arguments freely competing for acceptance in a forum
that is open to all who wish to speak. This model can be applied to
commercial, as well as political, speech because the free enterprise
economic system depends on a well-informed body of decision-
makers, just as the system of democratic self-government depends
on a well-informed electorate. By opening up the First Amendment
marketplace to commercial speech, with the important caveat that
such speech can be purged of deceptive statements by government
regulation, the Court in effect validated sixty years of FTC activity
which has been geared toward assuring that the stream of commer-
cial information flows freely, as well as cleanly.

The newfound constitutional protection for commercial speech
provided the rationale, in part, for a new wave of FTC initiatives
in the late 1970's to strike down barriers to the free flow of infor-
mation through nondeceptive advertising. These recent efforts to
increase information in the marketplace will be discussed next.

IV. ELIMINATING BARRIERS TO INFORMATION (ADVERTISING)

A. Professional Advertising

1. FTC Initiatives

State laws, voluntary codes of trade associations, and profes-
sional codes of ethics can sometimes impede the flow of truthful
commercial information to consumers by placing unjustifiable re-
strictions on advertising. FTC remedies have always recognized
that advertising has a valuable role to play in informing potential
buyers what products are available and at what price. Prohibitions
on truthful advertising have been stricken as "unfair" by the Com-
mision, using First Amendment protection for commercial speech
as part of the public policy foundation for a finding of unfairness.\textsuperscript{117}


\textsuperscript{117} In order to declare a trade practice "unfair" under the FTC Act, the Commission has
used a three-pronged test which examines: (1) the extent of consumer injury caused by the
The FTC has moved to rid the marketplace of such barriers in areas of health-related products, professional services, and comparative advertising. In 1975, as many as thirty-four jurisdictions imposed significant obstacles to the disclosure of prescription drug prices, either through state law or pharmacy board regulations. A proposed FTC rule would have made it an unfair practice for anyone to restrain retailers of prescription drugs from disclosing accurate price information. The rulemaking process was halted soon after the Supreme Court issued its landmark decision in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council which struck down a state ban on prescription drug advertising. After exhaustive study, FTC staff concluded in a December, 1977 memorandum to the Commission that the Virginia Pharmacy case had effectively eliminated state restrictions and that private interference with pharmacists' advertising had declined. The proposed rule was withdrawn.

Concurrent with the prescription drug proceeding, FTC staff was also gearing up for a trade regulation rule on the advertising of ophthalmic goods and services. In a rulemaking initiated on January 16, 1976, FTC staff documented that advertising by either optometrists or opticians was restricted by state or private regulation in forty-nine states. A rule eliminating public and private restrictions on advertising for eyeglasses, contact lenses and eye examination was issued on June 2, 1978.

A series of FTC investigations, rulemaking proceedings and antitrust suits are currently exploring the legality of self-imposed ad-

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practice; (2) whether the practice is immoral or oppressive; or (3) whether it violates some precept of public policy. See FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), which apparently approved these criteria as sufficient but not necessary factors in determining unfairness. For a critique of unfairness theory as applied by the Commission, see Schwartz, Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Unfairness, 11 Akron L. Rev. 1 (1977).


119 This proposed rule would have been codified at 16 C.F.R. § 447.


124 Id. at 23992, rev'd and remanded in part sub nom. American Optometric Ass'n v. FTC, _ F.2d _ (D.C. Cir. 1980). The rule also requires the eye examiner to furnish a copy of the prescription free of charge to the client at the conclusion of the examination.
Advertising restrictions in various professions, including doctors,\textsuperscript{125} dentists,\textsuperscript{126} accountants, and veterinarians. These professions objected to advertising because: (1) they felt the individualized nature of the services provided could make it deceptive to advertise a standard price; (2) they feared that claims regarding quality would mislead the public; and (3) they felt that advertising would “de-mean” the profession.

Consumers must nonetheless shop and pay for professional services. FTC initiatives focused on this consumer handicap in the form of barriers to the flow of information to determine whether they were unfair or anti-competitive. Official FTC action may not be required in many of these areas, however, due to recent Supreme Court decisions on commercial speech, and resultant voluntary removal of advertising prohibitions by private groups.\textsuperscript{127}

2. Benefits of Free Flow Approach

The Supreme Court has noted that “[a]dvertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange.”\textsuperscript{128} Freedom to advertise can help reduce consumers’ search costs which might otherwise be inordinately high. The Virginia Pharmacy court, for instance, was concerned that “[t]hose whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged.”\textsuperscript{129} These consumers may not be in a position physically to go from store to store to determine the best price for a specific drug. Bereaved relatives are also under severe time constraints and psychological pressures which may deter comparison shopping for funeral services in the absence of advertising or telephone price informa-

\begin{footnotesize}
\bibitem{125} In re American Medical Ass’n, held that ethical restrictions against advertising by physicians constituted an unfair method of competition.
\bibitem{126} The American Dental Association agreed to eliminate its ad restrictions except those against false and deceptive advertising, and to be bound by the terms of the final order in American Medical Association. In re American Dental Ass’n.
\bibitem{127} The national associations of both veterinarians and accountants voluntarily eliminated ad restrictions from their codes of ethics in the wake of Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (state ban on attorney advertising violated the first amendment) and FTC investigations.
\end{footnotesize}
tion. Newcomers to a region may also find it difficult to learn about the availability of various professional services in the absence of advertising. Indeed, the Supreme Court theorized that the restriction against lawyer advertising had "serve[d] to increase the difficulty of discovering the lowest cost seller of acceptable ability."\(^\text{130}\)

Price advertising for standardized professional services could facilitate comparison shopping. Routine physical checkups, tooth extractions, tax return preparations, and the spaying of household pets to name a few examples, could be advertised at set prices without misleading consumers. The objection that professional services are so individualized that they are not amenable to price advertising is inapplicable in these situations.\(^\text{131}\)

Information restraints are generally anticompetitive because they tend to keep prices high, restrict new entrants and hinder the formation of markets for alternative forms of service.\(^\text{132}\) Agreements to refrain from advertising by gasoline service station dealers\(^\text{133}\) and by an association of funeral directors,\(^\text{134}\) for instance, have been held to violate antitrust laws. Joint advertising efforts, on the other hand, (e.g., a national tire company sponsoring discount price ads covering all local dealers) may increase information to consumers, but could be used by the parent company to police prices.\(^\text{135}\)

A Code of Ethics provision prohibiting competitive bidding by professional engineers was declared a *per se* violation of the Sherman Act because, among other things, the challenged restriction forced a would-be comparison shopper to hire and fire a series of engineers in order to ascertain the most economical alternative. This procedure clearly "increases the cost of gathering price infor-


\(^{131}\) Id. at 372-73.


\(^{133}\) United States v. Gasoline Retailers Ass'n, 285 F. 2d 688 (7th Cir. 1961).

\(^{134}\) Wisconsin v. National Funeral Directors Ass'n, TRADE CASES ¶ 72, 789 (Milwaukee Cir. Ct., Wis. 1967).

mation, and hence will dampen price competition," concluded Justice Blackmun in his concurring opinion.\textsuperscript{136}

By lowering search costs for consumers and facilitating comparison shopping, advertising can result in price competition which reduces prices generally. This proposition has been supported empirically. Comparison studies of eyeglass advertising showed that prices were substantially higher (by twenty-five to forty percent) in states which banned advertising than in jurisdictions which had no restrictions.\textsuperscript{137} The FTC Staff Report on Prescription Drug Price Disclosures also cited independent research comparing prices in states with and without information restrictions.\textsuperscript{138} FTC economists projected substantial savings to consumers if ad bans were lifted nationally.

FTC investigations of veterinarians and dentists uncovered a wide variety of prices for standardized procedures. The staff hypothesized that if prices were known, more people would choose low-cost alternatives, shifting all prices toward the lower end of the scale due to the forces of competition. This evidence is not conclusive, however, since price disparity could also be caused by differences in quality among the service providers.

Bans on advertising also tend to restrain competition by making it difficult for new entrants to break into the market. The Bates opinion observed that lawyer ad bans had "perpetuate[d] the market position of established attorneys."\textsuperscript{139} The problem of newcomers seeking to build a clientele promises to become particularly acute for health professionals, since the number of practitioners in this field is expected to increase forty to seventy percent by 1990.\textsuperscript{140} Without advertising, this potential source of competition

\begin{thebibliography}{9}
\item[137] 43 Fed. Reg. 23, 995 (1978). See also FTC Staff, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry, April, 1980, in which FTC economists found in an empirical study that the price of optometrists' services was lower in cities which allowed advertising by optometrists than in those which did not, while the quality of care remained constant. The average price for an eye examination and eyeglasses was $22.67 lower in the non-restrictive cities. Id. at 54.
\item[138] Staff Report, supra note 118, at 156-67.
\item[140] HEW, REPORT TO THE PRESIDENT AND CONGRESS ON THE STATUS OF HEALTH PROFESSIONAL PERSONNEL IN THE UNITED STATES, at I-1 and Table A-II-1 (1978). This increase is expected to outpace the general population growth, so that the ratio of health professionals per capita will also rise in this period. Id.
\end{thebibliography}
could be stifled.

Advertising by new entrants in the field of professional services not only enhances competition per se, it can also facilitate the expansion of services to previously underserved groups. Ghetto residents who have become accustomed to resorting to hospital emergency rooms for day-to-day medical problems, for instance, could benefit from learning through advertising about young doctors, who because of the increased supply of physicians, may attempt to establish practices in urban areas.

Similarly, information about prices could reduce the hesitancy of some consumers to seek professional help. The Bates decision noted that middle class consumers tend to overestimate drastically the average fees charged by lawyers for routine procedures. Freedom to advertise could eliminate the mystique, so that more people could benefit from professional help.

Technological advances, such as computerized accounting, and innovative forms of health and legal practice, such as prepaid clinics, may be prevented from forming a market by restrictions on advertising. The initial FTC decision in the American Medical Association case cited several examples of alternative services which were inhibited by informational restraints. A California doctor who wanted to offer a package of occupational health and safety services was forbidden to make direct contact with companies. A house-call program in Kansas and an inexpensive package of coronary tests in Tennessee were dropped after local medical societies prohibited advertising.

Lifting bans on ads has already had dramatic results in the provision of legal services. An American Bar Association survey found that the number of legal clinics has increased dramatically since the Supreme Court struck down ad restraints in 1977.

3. Need for Further Regulation?

Eliminating restraints on advertising is an attractive remedy because it relies on market forces spontaneously to increase the flow of information to consumers with a minimum of government inter-

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142 In re American Medical Ass'n, 258 (initial decision).
143 Id. at 258-259.
ference. Yet there may be instances in which the mere lifting of formal restrictions may not be sufficient. An official ban on advertising by funeral directors was removed in 1968 pursuant to a Justice Department consent decree, yet an FTC rulemaking record ten years later showed that very little price advertising was being undertaken.\textsuperscript{145} Prescription drug ads since the Virginia Pharmacy case in 1976 have tended to be limited to large chain stores.

Peer pressure within the community of service providers may be hindering the flow of information, despite the lifting of restrictions. An analogous situation has been encountered by an FTC investigation of real estate brokers. Although there are no longer any formal requirements for customary fees, the FTC staff found that fees were uniformly high. An anthropological study showed that cultural and social factors such as peer pressure and fear of ostracism contributed significantly to the maintenance of standard prices.\textsuperscript{146} A similar process could be holding back advertising among certain professionals.

The picture is somewhat brighter with regard to legal services. Although only seven percent of American lawyers have started to advertise thus far, the chairman of an ABA commission which surveyed attorney advertising has stated that "more attorneys want to advertise and are currently doing so. Many attorneys do not advertise because of peer pressure and lack of familiarity with advertising techniques."\textsuperscript{147}

It may be simply a matter of time until professional advertising becomes accepted more widely. In the alternative, increased ownership of professional service corporations by laypersons not affected by peer pressure against advertising could also increase information flow.

Advertising was resisted by the professions because of the fear that it would lead to a decline in the quality of services provided. In Virginia Pharmacy, for instance, the state argued that advertising would undermine the pharmacist-customer relationship.\textsuperscript{148} In Bates, the bar association feared that advertising would have an

\textsuperscript{145} FTC Staff, Report on Funeral Industry Practices 55, n. 86 (June, 1978).


\textsuperscript{147} ABA Report, supra note 144, at 6.

adverse effect on quality.\textsuperscript{149} The Court rejected this notion, however, because state licensing boards could and should maintain professional standards without the need for keeping the public in ignorance.\textsuperscript{150}

Eliminating bans on advertising may increase the burden on state and federal law enforcement agencies to police deceptive advertising simply because there will be advertising for certain goods or services where previously there was none. Bans on all ads (as opposed to case-by-case cease and desist orders) had the advantage of automatically eliminating misleading ads, but such an approach was rather Draconian. Cases extending First Amendment protection for commercial speech have indicated that, in general, the state must find a less restrictive method for regulating deception than across-the-board prohibitions on advertising.

The \textit{Virginia Pharmacy} case stated this proposition rather forcefully: “It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”\textsuperscript{151} And in evaluating the defenses of the attorney ad ban in \textit{Bates}, the Court said “we view as dubious any justification that is based on the benefits of public ignorance.”\textsuperscript{152}

Some forms of professional advertising, such as in-person solicitation, may be so susceptible to abuse that they should remain restricted in some way. The Supreme Court upheld a ban on in-person solicitation by lawyers because of the potential for deception: “The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking. . . .”\textsuperscript{153}

Yet personal selling has the benefit for consumers that the information can be tailored to the individual’s particular interests and needs. Consequently, the FTC has chosen a less confining remedy for the analogous problem of in-home sales, in the form of a three-day cooling-off period.\textsuperscript{154} A similar approach might be considered

\textsuperscript{151} Id. at 770.
\textsuperscript{153} Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978).
\textsuperscript{154} 16 C.F.R. § 429 (1980).
for professional solicitation (e.g., a right to cancel a contingency fee agreement with a lawyer in personal injury cases), even though this is apparently not required by the First Amendment.

The Supreme Court left unanswered the question whether the state could restrict quality claims for professional services which are "not susceptible of precise measurement or verification. . . ."155 As suggested above, the FTC's regulatory focus has traditionally been on false or misleading objective claims, leaving the subjective ones more or less in the realm of caveat emptor. While some professional quality claims can be verified (e.g., years of practice, board certification, advanced degrees), it is unclear how the FTC would handle such vague claims as "good quality medical care."

The FTC's efforts to eliminate ad bans have not provided an exception for "subjective" quality claims. These claims should probably be scrutinized for deception and held to the same standards as all other advertising claims. A case-by-case approach is probably best, since any across-the-board restrictions would inevitably result in the suppression of truthful claims.

B. Comparative Advertising

1. FTC Initiatives

Truthful advertisements which make direct comparisons with competing products, if properly used, can provide a ready source of information concerning relative product prices and characteristics.156 Comparative advertising is also a potential tool for rebutting the false or inaccurate claims of competitors, which could make the marketplace of commercial ideas "self-correcting."

As was the case with advertisements for health-related products and professional services, comparative advertising was at one time held back by self-imposed industry regulations as well as some

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156 In a policy statement the Commission stated that it:
has supported the use of brand comparisons where the bases of comparison are clearly identified. Comparative advertising, when truthful and nondeceptive, is a source of important information to consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace. For these reasons, the Commission will continue to scrutinize carefully restraints upon its use.

public restraints. For instance, a 1966 compilation of major advertising codes, self-regulatory review procedures and media acceptance criteria contained some sixty provisions which effectively discouraged comparative advertising. The CBS and ABC television networks systematically rejected commercials that named competitors, leaving advertisers with little or no incentive to produce a comparative campaign that could run only on NBC. By restricting advertisers to "Brand X" comparisons, the networks' policy "provide[d] consumers with less usable information than would be the case if specific comparatives were made. ..."158

After a series of informal visits and correspondence by FTC staff, however, the two recalcitrant networks agreed in 1972 to allow specific comparative advertising on the air.159 NBC and ABC have subsequently issued guidelines which seek to ensure that comparative ads are both fair to competitors and of value to consumers. The American Association of Advertising Agencies has adopted a similar approach.160 By 1978, most of the other self-imposed restrictions on comparative advertising had been dropped or revised to eliminate questionable aspects, with the exception of restrictions on "disparaging" ads.

Formal barriers may still exist for would-be comparative adver-

158 Pitofsky, "Network Policy of Preventing Advertisers from Naming Competitors," memorandum to the Commission, at 1 (March 6, 1972) (Pitofsky was then Director of FTC's Bureau of Consumer Protection).
159 Id.
160 NBC's 1974 guidelines require that:
1. Products identified in the advertising must actually be in competition with one another.
2. Competition shall be fairly and properly identified.
3. Advertisers must refrain from discrediting, disparaging, or unfair attacks. [This provision may unduly limit nondeceptive comparative ads].
4. Identification must be made for comparison purposes and not simply to upgrade by association.
5. Advertising should compare related or similar properties of the product, feature to feature, whenever possible by a side-by-side demonstration.
6. The property being compared must be significant in terms of value or usefulness of the product to the consumer.
7. The difference in properties must be measurable and significant.
161 Wilkie & Farris, supra note 160 at 10.
tisers of alcoholic beverages, however, due to government regulations which prohibit product comparisons of a derogatory nature. The regulatory interpretation by the Bureau of Alcohol, Tobacco and Firearms (BATF) of a statutory ban on “disparaging” ads for alcohol\textsuperscript{162} may have precluded much truthful and nondeceptive comparative advertising by prohibiting “disparaging” ads\textsuperscript{163} and taste tests.\textsuperscript{164} Industry members have complained to the FTC and elsewhere that BATF’s approach has chilled their attempts to challenge competitors’ claims through advertising.\textsuperscript{165} Spurred by a complaint from a competing brewer that BATF regulations were preventing it from advertising that Lowenbrau is no longer a German import but is brewed domestically, FTC Chairman Pertschuk initiated correspondence with BATF in July, 1978 to encourage that agency to allow truthful, albeit derogatory, ads.\textsuperscript{166} In November, 1978, BATF requested comments from the public on proposed changes in their regulations on alcohol advertising.\textsuperscript{167} The Commission responded, suggesting that

this BATF interpretation should be completely revised so as to permit, indeed encourage, the use of truthful, nondeceptive comparative statements in advertising.\textsuperscript{168}

2. Future Prospects—Benefits of Comparative Advertising

The Commission and other regulatory bodies should take an aggressive stance in promoting the use of non-deceptive comparative advertising because it has the potential to:

- make the marketplace of commercial ideas self-correcting;
- provide consumers with valuable information; and
- facilitate competition.

\textsuperscript{163} BATF, Industry Circular No. 76-2 (1976).
\textsuperscript{166} Letter from FTC Chairman Michael Pertschuk to Honorable W. Michael Blumenthal (July 21, 1978).
\textsuperscript{167} 43 Fed. Reg. 54,266 (1978).
Each of these factors will be discussed in turn below.

In the political arena, First Amendment theory has traditionally encouraged free and robust debate so that all ideas can potentially generate counter-ideas. Comparative advertising, by providing a medium for commercial speakers to counter the false claims of competitors, could result in an analogous self-correcting marketplace of commercial ideas. Such a development would not only promote the First Amendment goal of a healthy give and take among speakers with varying viewpoints, it could also have the benefit of reducing the government's burden of policing deceptive ads.\footnote{One commentator has noted that comparison advertising could reduce the FTC's regulatory burden, not because of the countering of false claims by competitors, but because "[f]ears of legal problems will most likely impel advertisers to use greater caution in making sure their advertisements are based on clear, honest and substantiatable facts, which is of course a major benefit the FTC hopes will come from greater use of comparison advertising." Rotfeld & Hisrich, \textit{Comparison Advertising: Preliminary Findings on Practitioners' Perspectives,} at 13, Working Paper, Marketing Department, Boston College (1979) (submitted for presentation to American Academy of Advertising 1979 National Conference).} The self-correcting marketplace remains a theoretical goal at the present time, but provides a firm philosophical basis for encouraging the development of comparative advertising in the future.

By contrasting the attributes of competing products or services in a single format, comparative advertising can provide a useful frame of reference for evaluating sellers' claims, and can significantly reduce the cost to consumers of obtaining information.\footnote{Wilson, "Comparative Advertising: Some Current Considerations for Managerial Planning and Strategy," in \textit{Current Issues \& Research in Advertising, 5} (J. Leigh \& Martin Eds. 1978).} Marketing studies to date have shown mixed results regarding the perceived usefulness of comparative ads to consumers, however. For instance, one study concluded that consumers did not increase comparison shopping when exposed to comparative claims.\footnote{Sheluga \& Jacoby, "Do Comparative Claims Encourage Comparison Shopping?" in Leigh \& Martin, \textit{supra} note 110, at 35.} Another showed that consumers were more interested in apparently substantiated claims than in comparative ads \textit{per se}.\footnote{McDougall, "Comparative Advertising: The Effect of Claim Type and Brand Loyalty," in Leigh \& Martin, \textit{supra} note 110, at 50.} It may well be that advertisers will perfect techniques to increase the efficacy of comparative information to consumers.

Comparative advertising is pro-competitive in two ways. First,
companies may seek to compensate for direct criticism by lowering prices or improving products. One marketing expert has remarked that: "Price wars . . . can be directly attributed to the increased competitive activity resulting from comparative advertising." And Helene Curtis, a company which markets a line of low-priced shampoo and hair conditioners, was able to increase dramatically the sales of its "Suave" label products through comparative price advertising.

Second, comparative advertising allows new market entrants to gain a foothold among established brands. The head of a well-known advertising agency put it this way: when done properly a comparative ad "invites the consumer to try something new." Savin, a relatively new brand of photocopier, has clearly benefitted from the freedom to compare itself with the market leaders. Savin took on Xerox and IBM in a $4 million comparative advertising campaign and quadrupled its sales since 1974. Other potential competitors may make similar gains in the future as comparative advertising becomes accepted.

Despite the elimination of formal restraints, the level of comparative ads has remained relatively low. Only eight to ten percent of current advertising fare actually names competitors. There are several reasons why advertisers may shy away from the comparative technique.

Many fear that naming names will result in sponsor misidentification, with consumers remembering only the opposing brand. Market leaders fear that comparing themselves with less well-known rivals will benefit the competitor through a "rub-off" effect.

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174 See Smith v. Chanel, Inc., 402 F.2d 562, 567 (1968) (manufacturer of perfume imitating "Chanel No. 5" allowed to name the latter in ads because "the economically irrelevant appeal of highly publicized trademarks is thought to constitute a barrier to the entry of new competition into the market").
175 Morner, supra note 174, at 104.
176 Id. at 111.
177 Wilson, "Comparative Advertising: Some Current Considerations for Managerial Planning and Strategy," in Leigh & Martin, supra note 110 at 5; Morner, supra note 174, at 104.
Newcomers fear that publicizing the name of an established brand will only serve to solidify the leader's position. Indeed, McDonald's management was reported to be delighted over comparative ads by its fast-food competitor, Jack-in-the-Box. 180

Behavioral studies measuring the sales effectiveness of comparative ads have been inconclusive. While some show that comparatives produce higher recall,181 capture attention better182 and are more interesting,183 others conclude that they are more confusing and less believable,184 and that “Brand X” comparatives are just as effective as using specific names.185 Given these risky prospects, many advertisers may not wish to change from more tried-and-true promotional methods.

Comparative ads have generated a fair amount of litigation among competing sponsors.186 A comparative ad campaign by Schick resulted in lawsuits costing more than $12 million.187 Commercials promoting the Miami Herald “TV Book” in which a copy of TV Guide was displayed for comparison, subjected the newspaper to a copyright infringement suit in federal court.188 In addition, the networks and the National Advertising Review Board apparently view comparative advertising as warranting special scrutiny. Such prospects form an extra cost of comparative advertising that may discourage many sponsors from using it.

Finally, the naming of names may be viewed by some industry members as an unseemly, demeaning form of jungle warfare which they would prefer to avoid. The reaction of some wine makers to

181 Mazis, supra note 179, at 28.
184 Ogilvy & Mather Research, supra note 179, at 8.
185 Prasad, Communications—Effectiveness of Comparative Advertising: A Laboratory Analysis, 128-37 (May 1976) cited in Mazis, supra note 179, at 13.
the use of comparative taste tests by Taylor Wines (a subsidiary of Coca-Cola) may be illustrative. One vintner stated that the Taylor approach was "unhealthy for the industry; it promotes ill-will." Another put it more bluntly: the comparative technique would "shoot the camaraderie of the industry all to hell."

The ideal comparative ad is one which compares material product attributes in concrete and measurable terms. Ads which compete on purely subjective or insignificant aspects may not be as useful in achieving the goal of informed decision-making by consumers, yet these are precisely the types of claims which some advertisers may find most advantageous. High expectations about the utility of comparative advertising must be tempered by a realistic appraisal of the nature of the selling medium. As one marketing professor put it:

Advertisers are going to use direct comparisons only if they think the ad will be effective in persuading consumers to purchase their brand. The information contained in these ads is designed primarily to persuade and it is selective and unbalanced. It will not be a comprehensive comparison like Consumer Reports.

CONCLUSION

Information is an essential element in the proper functioning of a free market economy. Yet the optimal amount of this precious commodity apparently is not produced spontaneously. Unlike the ideal, all-knowing buyer who provided the theoretical basis for the rule of caveat emptor, today's consumer cannot count on having all the relevant facts simply by relying on marketplace forces. Modern conditions compel government intervention to achieve the competitive goals of the laissez-faire philosophers. FTC regulatory initiatives in particular have sought to break down barriers to the provision of commercial data by willing parties through advertising, as well as requiring sellers to disclose information or standardize their claims to avoid illegal deception. As long as such regulations are carefully tailored to avoid undue interference with market forces,

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189 Competitor Rips Taylor Ads, ADVERTISING AGE 1, 117 (October 10, 1978).
190 Id.
191 McDougall, supra note 172, at 51.
they can help build the necessary information environment that can spawn a healthy, competitive marketplace.