**BEFORE THE**
**DEPARTMENT OF THE TREASURY**
**UNITED STATES MINT**

# Comments of the Staff of the Bureau of Consumer Protection, Bureau of Economics and the Office of Policy Planning of the Federal Trade Commission on Assessment of Civil Penalties for Misuse of Words, Letters, Symbols, and Emblems of the United States Mint

**March 11, 2005***

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*These comments represent the views of the staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission. They do not necessarily represent the views of the Federal Trade Commission or any individual commissioner. The Commission, however, has authorized the staff to submit these comments.

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## I. INTRODUCTION

The staffs of the Bureau of Consumer Protection, Bureau of Economics, and Office of Policy Planning of the Federal Trade Commission ("FTC" or "Commission")[1] respectfully submit these comments in response to the notice of proposed rulemaking regarding the assessment of civil penalties for misuse of words, letters, symbols, and emblems of the United States Mint ("Mint").[2] Although the FTC's mission and authority are different from the Mint's, we offer these comments because our experience with advertising interpretation and First Amendment issues may be instructive as the Mint enforces its new regulations.

### A. Background

Congress has authorized the Secretary of the Treasury to assess a civil penalty against any person who has misused certain words, titles, symbols, or badges of the Department of the Treasury, including the Mint.[3] The Secretary of the Treasury delegated to the Director of the Mint the authority to enforce the civil penalty provisions for misuse of Mint words, titles, symbols, and emblems. The Mint's proposed rule closely tracks the statutory language and sets forth procedures to ensure that persons subject to a civil penalty are accorded due process.[4]

Under the proposed regulations, the Mint may impose a civil penalty against any person who (1) uses the words "Department of the Treasury," "United States Mint" or "U.S. Mint";

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2 70 Fed. Reg. 2081 (Jan. 12, 2005) ("Notice").

3 31 U.S.C. § 333(c).

4 According to the Notice, the Mint's proposed procedures are based on the Department of Treasury procedures at 31 C.F.R. Part 27.

related titles, abbreviations, initials, symbols, emblems, letters, seals, or badges; or any colorable imitation of any such words or symbols, in connection with any advertising, solicitation, business activity, or product, (2) "in a manner that could reasonably be interpreted or construed as conveying the false impression that such advertisement, solicitation, business activity, or product is in any manner approved, endorsed, sponsored, authorized by or associated with the United States Mint, or any officer, or employee thereof."[5] In accordance with the express language of the statute, the Mint's proposed regulations further provide that any determination of whether a person has violated these provisions "shall be made without regard to any use of a disclaimer of affiliation with the United States Government or any particular agency or instrumentality thereof."[6]

The Mint's Notice requests comments on the proposed rule from all interested persons.[7]

B. FTC Interest

The Commission shares the Mint's interest in ensuring that consumers who collect and trade coins and other numismatic items are not deceived by misleading advertising and marketing claims. The Commission enforces Section 5 of the FTC Act, which broadly prohibits "unfair methods of competition and deceptive or unfair acts or practices in or affecting commerce."[8] One of the agency's principal responsibilities under Section 5 is to ensure that claims made in national advertising are truthful. In enforcing Section 5, the Commission has prosecuted

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5 Notice, 70 Fed. Reg. at 2082 (proposed 31 C.F.R. § 92.13(a)).

6 *Id.* (proposed 31 C.F.R. § 92.13(b)).

7 Although the Notice requests the submission of comments on or before February 18, 2005, Mint staff agreed that FTC staff may submit comments on or before March 11, 2005.

8 15 U.S.C. § 45.

numerous "rare coin" marketers who misrepresented the quality and investment value of their coins.[9] Moreover, the Commission is charged with enforcing the Hobby Protection Act, which requires that imitation numismatic items (i.e., coins, tokens, paper money, and commemorative medals) be marked "plainly and permanently" with the word "copy."[10] Through law enforcement activities and research conducted in support of its mission, the FTC has developed expertise in analyzing advertising and the claims it conveys to consumers.[11] The Commission's law enforcement and policy approaches seek to ensure that products and services are marketed in a manner that is truthful and not misleading, and that consumers have adequate information to make well-informed purchasing decisions.

C. Overview

The FTC staff believes our experience with advertising law and First Amendment commercial speech jurisprudence can help inform the Mint in its efforts to implement procedures and impose civil penalties for misuse of certain words and symbols. The FTC's experience is particularly relevant in how to assess whether advertising could reasonably be interpreted as conveying the false impression that a product is associated with the Mint. Although we recognize that the Mint is closely following the statutory directive (and regulatory precedent), the

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9 *E.g., FTC v. Security Rare Coin & Bullion, Corp.*, 931 F.2d 1312 (8th Cir. 1991); *FTC v. Goddard Rarities, Inc.*, No. CV 93-4602 (C.D. Cal. complaint filed Aug. 3, 1993).

10 15 U.S.C. §§ 2101-06. As directed by the Hobby Protection Act, the Commission has issued rules that prescribe marking requirements for imitation numismatic and political items. 16 C.F.R. Part 304.

11 The Commission's expertise in evaluating consumers' interpretation of advertising claims has been judicially recognized. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Kraft, Inc. v. FTC,* 970 F.2d 311, 319 (7th Cir. 1992); *Thompson Med. Co. v. FTC*, 791 F.2d 189,197 (D.C. Cir. 1986); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40 n.1 (D.C. Cir. 1985); *American Home Prods. Corp. v. FTC,* 695 F.2d 681, 687 n.10 (3d Cir. 1982).

proposed rule's treatment of disclaimers of affiliation in this process may raise some potential legal and policy issues. Since the enactment of the authorizing statute, the federal courts have issued opinions that further define the bounds of government regulation of commercial speech in general, and consideration of disclaimers in particular. Accordingly, we encourage the Mint to consider these opinions in implementing and enforcing its proposed rule, to ensure its consistency with First Amendment case law.

To assist the Mint in implementing its proposed rules, the following briefly outlines the relevant principles of the commercial speech doctrine, and sets forth the FTC's approach to reviewing advertising claims.

## II. THE FIRST AMENDMENT, COMMERCIAL SPEECH, AND DISCLAIMERS

First Amendment commercial speech jurisprudence is premised on the value to consumers and competition of the free flow of truthful information. The Supreme Court has held that commercial speech, including most advertising, is entitled to protection under the First Amendment.[12] False, deceptive, or misleading advertising, however, is subject to restraint.[13]

In *Central Hudson Gas & Electric Corp. v. Public Service Commission,* the Supreme Court articulated a four-part test for courts to apply in evaluating whether government restrictions on commercial speech are constitutional. First, if the commercial speech concerns unlawful activity or is misleading, it is not protected by the First Amendment. Second, if the

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12 *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765-70 (1976).

13 *In re R.M.J.*, 455 U.S. 191, 200 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it."); *Virginia State Bd.*, 425 U.S. at 771-72.

commercial speech concerns lawful activity and is not misleading, the court will ask "whether the asserted governmental interest is substantial."[14] Third, if it is substantial, the court "must determine whether the regulation directly advances the governmental interest asserted."[15] Fourth, the court must determine "whether [the regulation] is not more extensive than is necessary to serve that interest."[16] To this end, the requisite fit between the government restriction and its objective must be "a fit that is not necessarily perfect, but reasonable . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."[17]

The D.C. Circuit has applied the *Central Hudson* test to commercial speech restrictions imposed by a government agency, where the agency refused to consider whether disclaimers could effectively alleviate potential consumer deception. In *Pearson v. Shalala*,[18] dietary supplement manufacturers sought FDA pre-approval for four "health claims" in product labeling. The FDA refused to approve the claims because they were not supported by the agency's "significant scientific agreement" standard of evidence; consistent with agency practice, the FDA refused to consider the manufacturers' argument that disclaimers could prevent these claims from being misleading.

On appeal, the D.C. Circuit held that, because the government had not considered

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

15 *Id.*

16 *Id.*

17 *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

18 164 F.3d 650 (D.C. Cir. 1999); *see also Whitaker v. Thompson,* 248 F. Supp. 2d 1 (D.D.C. 2002) (related case).

whether disclaimers could have eliminated the potential for misleading consumers, its ban on the four health claims violated the First Amendment. The D.C. Circuit recognized that the government has a substantial interest in ensuring the accuracy of consumer information in the marketplace and banning *potentially* misleading claims would appear to directly advance that interest.[19] The court, however, held that the government did not meet its burden of proving that there was a reasonable fit between banning these claims and the government's interest in the prevention of fraud.[20] The court explained that the First Amendment commercial speech doctrine embodies a "preference for disclosure over outright suppression."[21] "[W]hen government chooses a policy of suppression over disclosure–at least where there is no showing that disclosure would not suffice to cure misleadingness–government disregards a 'far less restrictive' means" of advancing its interest.[22] The D.C. Circuit added, "while we are skeptical that the government could demonstrate with empirical evidence that disclaimers . . . would bewilder

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[19] *Id.* at 655-56. The court in *Pearson*, in limiting what the government can do in banning potentially misleading speech, also recognized that the government has broader authority to deal with inherently misleading commercial speech. "The Supreme Court has said 'there is no question that [the government's] interest in ensuring the accuracy of commercial information in the marketplace is substantial,' and that government has a substantial interest in 'promoting the health, safety, and welfare of its citizens. . . .' "*Id.* at 656 (quoting *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995), respectively).

[20] *Pearson*, 164 F.3d at 657.

[21] *Id. (citing* Supreme Court cases); *see also Washington Legal Found. v. Friedman,* 13 F. Supp. 2d 51, 73 (D.D.C. 1998)("The most obvious alternative [to a ban on commercial speech] is full, complete, and unambiguous disclosure by the manufacturer.").

[22] *Pearson,* 164 F.3d at 658; *see also Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 358 (2002) (government bans on commercial speech are more extensive than necessary if the government "can achieve its interests in a manner that does not restrict commercial speech, or that restricts less speech").

consumers and fail to correct for deceptiveness, we do not rule out that possibility."[23] If, however, a potentially misleading claim is incurable by disclaimer, the government may "ban it outright."[24]

## III. THE FTC APPROACH TO ADVERTISING INTERPRETATION

The Commission has determined that a representation, omission, or practice is deceptive under Section 5 of the FTC Act if (1) it is likely to mislead consumers acting reasonably under the circumstances; and (2) it is material, that is, likely to affect consumers' conduct or decisions with respect to a product or service.[25] In evaluating advertising, the Commission looks to the "net impression" made by the ad as a whole, including the text, product name, and depictions, without emphasizing isolated words or phrases apart from their context. That is, the Commission examines the "entire mosaic, rather than each tile separately"[26] The meaning of the ad and the likelihood of deception is considered from the perspective of a reasonable member of the audience to whom the ad is directed.

In most instances, the FTC proceeds by identifying and prohibiting deceptive claims in individual cases. Advertisers, therefore, remain free to make any claims they want, so long as the claims are truthful and not misleading. This flexible approach recognizes the importance of specific wording and the context of the claim, including whether and how the claim is qualified, in determining whether it is illegal.

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[23] *Pearson,* 164 F.3d at 659-660.

[24] *Id.* at 659; *accord Brown & Williamson,* 778 F.2d at 42-43.

[25] *See generally FTC Policy Statement on Deception, appended to Cliffdale Assocs.,* 103 F.T.C. 110, 174 (1984) (hereinafter *FTC Deception Policy Statement*).

[26] *FTC v. Sterling Drug,* 317 F.2d 669, 674 (2d Cir. 1963); *accord FTC Deception Policy Statement, supra* note 25, 103 F.T.C. at 179.

To determine what claims are made in an ad, the FTC carefully examines any disclaimers or disclosures to make sure that they are sufficiently clear and prominent to convey the qualifying information effectively. Qualifications are ineffective unless they are both *noticed* and *understood* by consumers. The FTC has provided guidance on what constitutes a clear and conspicuous disclosure, focusing on specific elements such as clarity of the language, prominence and placement of the disclosure in an ad, relative type size and proximity to the claim being qualified, and an absence of contrary claims, inconsistent statements, or other distracting elements that could undercut the disclosure.[27]

Although the Commission generally has favored disclosures over banning claims as a means of curing deception, disclosures do not always work. Accurate information in the text may not remedy a false headline, fine print disclosures may be insufficient to correct a misleading representation, other practices may direct attention away from the qualifying disclosures, and *pro forma* statements or disclaimers may not cure otherwise deceptive messages or practices.[28] A fine print disclosure at the bottom of a print ad or a brief video superscript in a television ad is unlikely to qualify a claim effectively.[29] Indeed, the Commission recognizes that

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[27] *FTC Deception Policy Statement, supra* note 25, 103 F.T.C. at 180 nn.33-34; FTC, *Dot Com Disclosures: Information about Online Advertising* (May 2000) (available online at <http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.pdf>) (hereinafter *Dot Com Disclosures).*

[28] *FTC Deception Policy Statement, supra* note 25, 103 F.T.C. at 180; *see also United States v. Mazda Motor of America, Inc.,* No. 8:99 CV 01213 (complaint and consent decree filed C.D. Cal. Sept. 30, 1999); *Thompson Med. Co.*, 104 F.T.C. 648, 797-98 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 1086 (1987).

[29] *See, e.g., Gateway Inc.,* No. C-4015 (FTC 2001) (consent order); *Haagen-Dazs Co.*, 119 F.T.C. 762 (1995) (consent order); *Kraft, Inc.*, 114 F.T.C. 40, 124 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992).

in many circumstances, reasonable consumers do not read (or view) the entirety of an ad.[30]

Moreover, in many circumstances, adding a qualifying phrase may not be effective. Even if consumers notice and understand the qualifying disclosure, it may be overwhelmed by a stronger message, or may appear to contradict that message and simply confuse consumers. It is well established in Commission law that qualifying language that contradicts the main message of the ad is not adequate to avoid deception.[31]

The FTC staff strongly supports conducting consumer research on the language and format of various disclaimers to determine whether they are effective in preventing deception.[32] Such research assists in developing a sound empirical basis for enforcement and civil penalty decisions.[33]

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[30] *FTC Deception Policy Statement*, *supra* note 25, 103 F.T.C. at 181; *Giant Food, Inc.*, 61 F.T.C. 326, 348 (1962) (Commission agreed that a fine-print disclaimer was inadequate to correct a deceptive impression, quoting from the hearing examiner's finding that "very few if any of the persons who would read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer"), *aff'd*, 322 F.2d 977 (D.C. Cir. 1963); *Dot Com Disclosures*, *supra* note 27, at 5.

[31] *E.g., FTC Deception Policy Statement*, *supra* note 25, 103 F.T.C. at 180; *Litton Indus.*, 97 F.T.C. 1, 71 n.6 (1981), *aff'd as modified*, 676 F.2d 364 (9th Cir. 1982), *modified*, 100 F.T.C. 457 (1982); *Giant Food*, 61 F.T.C. at 350. For example, the Commission may require excision of a deceptive trade name if any qualification would simply be a contradiction in terms or would confuse consumers. *See, e.g., Continental Wax Corp. v. FTC*, 330 F.2d 475, 479-80 (2d Cir. 1964); *FTC v. Enforma Natural Prods.*, No. CV 00-04376-SVW (C.D. Cal. consent order signed Jan. 13, 2005) (prohibiting use of "Fat Trapper" and "Exercise in a Bottle"); *Brake Guard Prods., Inc.*, 125 F.TC. 138, 252-53 (1998).

[32] *See Whitaker*, 248 F. Supp. 2d at 9 ("In this case, the Government has not satisfied its burden–there is no evidence that the proposed health claim, if accompanied by a disclaimer, would be deceptive or unlawful.").

[33] For an example of the importance of empirical testing to determining consumer understanding of advertising disclaimers, *see* DENNIS MURPHY ET AL., GENERIC COPY TEST OF FOOD HEALTH CLAIMS IN ADVERTISING, JOINT STAFF REPORT OF THE BUREAUS OF ECONOMICS AND CONSUMER PROTECTION, FEDERAL TRADE COMMISSION 19-26 (1998) <http://www.ftc.gov/os/1998/11/netfood.pdf> (research showed a very wide variation in the

In sum, the Commission's approach to preventing deception in the marketplace, and its emphasis on considering the net impression of the advertising at issue, including the context of claims and whether and how they are qualified, dovetail with First Amendment principles intended to promote the free flow of truthful and non-misleading commercial speech.

## IV. CONCLUSION

We wholeheartedly support the Mint's efforts to combat deceptive advertising for collectible and commemorative coins and related products and services. The FTC staff hopes that our experience in policing advertising claims may assist the Mint in implementing its proposed rule. In executing our mission, we have found that the First Amendment commercial speech doctrine is fully compatible with our vigorous consumer protection program. We trust that the same will hold true for the Mint.

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effectiveness of the tested nutrient content disclosures and warnings).

Respectfully submitted,

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