

September 30, 2002

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Comments Regarding Competition Law and Policy & Health Care

Dear Mr. Clark:

The Magazine Publishers of America, the trade association for the consumer magazine industry, is pleased to submit comments in response to the Federal Trade Commission's invitation to interested parties to provide written comment on the topics covered in the workshop held on September 9-10 on the issue of Health Care and Competition Law and Policy. These comments discuss direct-to-consumer advertising and promotion, which as described below, confers large benefits on consumers and the entire society. The FTC should continue to be a strong proponent of this advertising.

The Magazine Publishers of America ("MPA") is the principal trade association representing the consumer magazine industry. MPA's more than 240 U.S. members publish approximately 1200 magazines, including some of the most widely distributed consumer publications in America as well as local and specialized magazines.

BACKGROUND

Americans care about their health. This concern is reflected in health care expenditures which totaled \$1.2 trillion in 1999¹ or about 13 percent of the \$9.3 trillion of Gross Domestic Product.² These expenditures are projected to increase at an average rate of 7.4 percent per year for the next ten years (in nominal dollars).³ Thus, as the Commission noted in the Federal Register notice announcing the workshop, "The economic significance of health care is enormous, and will become even more so in the coming years."⁴

¹ U.S. Census Bureau, Statistical Abstract of the United States: 2001, NO. 119. National Health Expenditures – Summary, 1960 to 1999, and Projections, 2000 to 2010.

² U.S. Census Bureau, Statistical Abstract of the United States: 2001, NO. 640. Gross Domestic Product in Current and Real (1996) Dollars: 1960 to 2000.

³ Op. Cit. 1 and calculated from entries in it.

⁴ See FTC's Notice of Public Workshop and Opportunity for Comment; 67 Fed. Reg. 47365 (July 18, 2002)

Prescription drugs are an important component of health care; expenditures for them were \$100 billion in 1999⁵, or 8.9 percent of all health care expenditures. While not inconsiderable now, prescription drug expenditures will become even more important in the future as they are projected to grow at an annual rate of almost 12.8 percent (in nominal dollars) per year from 1999 at 2009, at which point they are projected to comprise almost 14 percent of health care expenditures.⁶ Thus, as the Commission might have noted in the Federal Register notice announcing the workshop, the economic significance of prescription drugs is also enormous, and will become even more so in the coming years.

Prescription drugs are promoted in a variety of ways: through advertisements in the professional literature, workshops, detailing, free samples to physicians, and directly to consumers in print and broadcast advertising. Relatively speaking, DTC advertising is a new phenomenon. In a letter to the *New England Journal of Medicine* in 1985 entitled “Matching Prescription Drugs and Consumers, The Benefits of Direct Advertising”, Alison Masson and Paul H. Rubin, then both of the Bureau of Economics of the Federal Trade Commission, noted “Prescription drugs are seldom advertised directly to consumers, partly because of strict regulation by the Food and Drug Administration. In fact, there has been a moratorium on direct consumer advertising since 1983.” The FDA lifted the moratorium in 1985⁷ and, in 1997, issued draft guidelines for broadcast advertising.⁸ DTC advertising has grown rapidly in recent years, from \$791 million in 1996 to \$2.467 billion in 2000.⁹

While complex interactions among consumers, their health care providers, and the organizations that provide consumers with health insurance influence many health care and pharmaceutical decisions and while firms determine the size of their DTC advertising expenditures, public policy also plays a critical role in determining both the performance and the size of the entire health care system. Thus, as the Commission noted:

It is exceedingly important that competition law and policy support and encourage efficient delivery of health care products and services. Competition law and policy should also encourage innovation in the form of new and improved drugs, treatments, and delivery options... Consumer/patient welfare is maximized by a health care system that efficiently delivers to Americans the services they desire.¹⁰

DTC advertising provides many important benefits to consumers in their health care decisions and helps the system deliver to Americans the services they desire. Because of this, it is also

⁵ Op. Cit. 1

⁶ Op. Cit. 1 and calculated from entries in it.

⁷ Food and Drug Administration, Department of Health and Human Services. Direct-to- Consumer Advertising Moratorium for Prescription Drugs Ended. 50 Federal Register 366-377.

⁸ Food and Drug Administration, Center for Drug Evaluation and Research, “Guidance for Industry Consumer-Directed Broadcast Advertisements, Questions and Answers,” August 1999, <http://www.fda.gov/cder/guidance/1804q&a.htm>.

⁹ Meredith B. Rosenthal, Ernst R. Berndt, Julie M. Donohue, Richard G. Frank, and Arnold M. Epstein; Promotion of Prescription Drugs to Consumers; *New England Journal of Medicine*, Volume 346, No. 7, February 14, 2002

¹⁰ Op. Cit 4

exceedingly important that competition law and policy also support and encourage truthful DTC advertising.

TRUTHFUL ADVERTISING IS CRITICAL TO EFFICIENT MARKETS

Markets allocate resources efficiently only if there is sufficient information for consumers to make informed decisions. But producing and then targeting and disseminating information to the appropriate audience costs money. Consumers also devote significant resources to gathering information so they can make informed decisions, but the time and money required limit the amount of information they gather. George Stigler shows that there is an optimal amount of search, which is a function of both the marginal cost and the marginal benefit of the search.¹¹ Since DTC advertising lowers the marginal cost of the search for information, it leads to increased search and lower search costs. As a result, with DTC advertising consumers have more information about their health care choices and so are able to make better health care decisions. At the simplest level, this can mean that some consumers who might otherwise believe there is no reason for them to see a doctor will learn that their health can be improved if they do so.

Information about health care is a public good, and economic theory shows why public goods are often underproduced in the marketplace.¹² Public goods, such as clean air, are difficult for private producers to provide because there is no way to limit their consumption to the individuals who have paid for them. To some extent, government and the popular press overcome the public good problem by providing health care information to consumers. However, there are many cases when the level of information provided by the government and the press is too low. For example, in the FTC's workshop, Sandra Raymond of the Lupus Foundation explained how advertising was critical in the 1980s to informing consumers about osteoporosis when adequate information was not being provided by other sources. Advertising provides additional information as well as a way for firms to overcome the public good issue and provide information to potential consumers. As such, DTC advertising helps make health care markets function better by providing health care information that in many cases would not otherwise be provided by public sources.

DIRECT TO CONSUMER ADVERTISING PROVIDES BENEFITS TO CONSUMERS

Advertising provides benefits to consumers by providing them with useful information (“...information is a valuable resource: knowledge is power¹³”) and by reducing prices.

An important mechanism for disseminating information about product benefits in a market economy is advertising. The ability of sellers to advertise spurs competition among alternative products and alternative providers. The ability to advertise tends to reduce prices in markets for consumer goods and

¹¹ George J. Stigler, *The Economics of Information*, *The Journal of Political Economy*, Volume LXIX, Number 3, June 1961

¹² Pauline M. Ippolito and Alan D. Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market Bureau of Economics Staff Report*, Federal Trade Commission, August 1989, page 18

¹³ *Op Cit* 11

services as well as in markets for prescription drugs. Moreover, advertising tends to improve the product alternatives available to consumers and to produce better matching between individual consumers and the best product to serve their needs.¹⁴

DTC Advertising Provides Consumers with Vast Amounts of Useful Information

Numerous studies have shown that DTC advertising provides useful, and perhaps even critical, information to consumers, helping them make better informed decisions, providing information that may not have been readily available, and even motivating them to visit doctors for previously untreated conditions. Thus, it lets them be active participants in managing their health care.

The FDA's Office of Medical Policy, Division of Drug Marketing, Advertising, and Communications of the Center for Drug Evaluation and Research surveyed consumers in 1999 to learn more about DTC advertising. Results from the survey "Attitudes and Behaviors Associated with Direct-to-Consumer (DTC) Promotion of Prescription Drugs" show numerous aspects of how important DTC advertising is to consumers in managing their health care.¹⁵ Study results show that a large percentage of consumers see advertisements for both prescription and nonprescription drugs (responses to questions 4, 5, 8.) Advertisements cause about half of survey respondents to look for more information about the drug or their health (response to question 13.) They also cause significant number of patients to talk to doctors about conditions or illnesses they had not previously discussed (response to question 15.) Over 85 percent of the respondents agreed that advertisements made them aware of new products. Finally, about 60 percent of the respondents agreed that "Advertisements for prescription drugs help me to have better discussions with my doctor about health" while only about 20 percent disagreed.

Prevention Magazine (with technical assistance from the FDA's Division of Drug Marketing, Advertising, and Communication) has also surveyed consumers for five years in a project which "measures and tracks consumer awareness of direct-to-consumer (DTC) advertising and assesses its overall effectiveness as a means of promoting both prescription medicines and public health."¹⁶ The findings of the survey also show that DTC has become an important component of the health care system and that advertising confers numerous benefits on American consumers, not all of which accrue from the increased uses of pharmaceuticals. According to the survey,

...DTC advertising motivated an estimated 61.1 million consumers to talk with their doctors about a health condition and possible treatments for it. For 60 percent of these consumers, these conversations include recommendations for non-drug therapies. Results also show that an estimated 24.8 million

¹⁴ J. Howard Beales III, FDA Regulation of Pharmaceutical Advertising: Economic Analysis and the Regulation of Pharmaceutical Advertising, 24 Seton Hall Law Review, 1370. 1994

¹⁵ accessed at www.fda.gov/cder/ddmac/dtcindex.htm

¹⁶ 5th Annual Survey: Consumer Reaction to DTC Advertising of Prescription Medicines, 2001-2002, Prevention Magazine, p 2

consumers were prompted by advertisements for prescription medicines to talk with their doctor about a health condition they had not previously discussed.¹⁷

At a very high level, Prevention Magazine finds tremendous value in DTC advertising:

In short, DTC advertising is effective as a means of promoting prescription medicines and the public health for a very simple reason: it provides consumers with the information they need in order to take control of their own health and meet their growing need to participate in the management of their own care.¹⁸

Years before the Prevention Magazine and the FDA surveys, the Bureau of Economics of the FTC performed two studies exploring the effect of advertising on information in the marketplace. The first studied the effects of advertising in the cereal market¹⁹ and the second studied the effects of advertising on fat and cholesterol consumption.²⁰ Both studies found benefits from advertising. The Cereal study found “clear evidence that in the cereal market producer advertising and labeling added significant amounts of information to the market and reached groups that were not well reached by government and general information sources.”²¹ And the conclusions of the study stated: “However, the study does make it clear that a policy that sharply limits advertising’s role in bringing evolving health information to consumers may come at a high information cost, whatever its other effects.”²²

The Fat and Cholesterol study explored whether advertising claims “...have led to improvements in food choices, or as some fear, to confusion sufficient to undermine consumers’ success in responding to the continuing public health advice on dietary choices.”²³ As the study notes,

Producer health claims have been controversial. While always subject to the normal legal rules for all claims -- claims must be truthful and not deceptive -- some believe that the increased use of health and nutrition claims in advertising and labeling during the late 1980s may have undermined consumers’ ability to make more informed dietary decisions and may even have harmed consumers.²⁴

But the study found that this was not the case:

¹⁷ Ibid at 3

¹⁸ Op.Cit. 16, page 5

¹⁹ Pauline M. Ippolito and Alan D. Mathios, Health Claims in Advertising and Labeling: A Study of the Cereal Market, Bureau of Economics Staff Report, Federal Trade Commission, August 1989,

²⁰ Information and Advertising Policy: A Study of Fat and Cholesterol Consumption in the United States, 1977-1990, accessed at www.ftc.gov/be/fatexsum.htm

²¹ Op. Cit. 15, page ix

²² Op. Cit. 15, page 118

²³ Op. Cit. 20

²⁴ Op. Cit. 20

The results of this report do not support this premise, at least as it relates to fat, saturated fat, and cholesterol consumption. Between 1977 and 1985, available evidence indicates that consumption of these lipids fell, but between 1985 and 1990, when the regulatory environment governing diet-disease claims was relaxed to make it easier to make explicit claims, consumption of lipids fell faster. Individual food consumption data and food production data support the view that improvements in the consumption of fat, saturated fat, and cholesterol occurred faster in the post-1985 period and that the gains are widely shared across the population. Data on diet-disease knowledge is generally consistent with the behavioral evidence.

While we cannot conclusively determine how much of the added improvement is due to the information environment created by health claims *per se*, as opposed to continuing government and public health efforts to inform consumers, or to the general media coverage of these issues, nothing in the evidence suggests that these producer claims undermine consumer learning or efforts to improve diets. In fact, the available evidence examined here suggests that these diet-disease claims may have been beneficial to consumers overall by helping to foster an environment in which firms compete more directly on the nutritional features of their products and in which consumer learning and dietary change proceed more rapidly.²⁵

DTC Advertising Leads to Lower Prices

There have long been arguments over whether advertising raises prices or lowers them.

It has been argued that the persuasive aspects and the product differentiation effects of advertising tend to raise the prices of products to consumers. On the other hand, by providing consumers with information about products and alternatives in the market, allowing them to economize on search and to locate low-priced sellers more readily, advertising may tend to lower prices to consumers. It may also lower prices by allowing sellers or producers to economize on merchandising costs and to take advantage of economies of scale.²⁶

Despite the claims of critics of DTC advertising that this advertising increases prices of prescription drugs, empirical evidence suggests the opposite, namely that advertising leads to lower prices. An early study of price differentials of prescription eyeglasses in states that permitted advertising and those that didn't, found that "advertising restrictions in this market

²⁵ Op. Cit. 20

²⁶ Lee Benham and Alexandra Benham, Regulating Through the Professions: A Perspective on Information Control, 18 Journal of Law and Economics, 421 (1985).

increase the prices paid by 25 percent to more than 100 per cent”.²⁷ A summary of the effects of advertising on price states:

The price reducing effects of advertising are not confined to the market for eyeglasses. Studies of legal services, advertising of prescription drugs by pharmacists, and retail gasoline price posting have all found that restrictions on the flow of information increase the price that consumers pay. Similarly, the introduction of toy advertising directed to children reduced prices.

Most of the available evidence concerns situations in which advertising has been entirely prohibited. Even where restrictions are less drastic, however, fewer restrictions on advertising are associated with lower prices...

The same competitive effects of advertising on prices also occur in prescription drug markets. When already-marketed products are approved for a new use, additional advertising by the entrant reduces the average price paid for all drugs used to treat that indication (relative to the prices of all drugs.) This effect occurs primarily because additional advertising by the entrant reduces the price of competitive products. Previous studies have also found that entry, assisted by pharmaceutical promotion, tends to reduce the price of competitive products.²⁸

FTC staff of the Bureau of Consumer Protection and the Bureau of Economics recently affirmed the view of the beneficial effects of advertising on price:

DTC prescription drug advertisements tend to focus on qualities of the drugs, not price. Economic research, however, suggests that consumers often infer that firms engaging in extensive nonprice advertising will also offer a better deal on price. Empirical studies of the prescription drug, eyeglass, and liquor industries find that advertising tends to reduce prices even when advertising of prices is prohibited.²⁹

THE FEDERAL TRADE COMMISSION SHOULD CONTINUE ITS TRADITIONAL ROLE AS A STRONG ADVOCATE OF TRUTHFUL ADVERTISING

The FTC has long been a strong advocate of truthful advertising, recognizing the crucial role that it plays to the economy in general and to consumers. For example, in 1979, the Commission’s statement of policy regarding comparative advertising noted:

²⁷ Lee Benham, The Effect of Advertising on the Price of Eyeglasses, The Journal of Law and Economics, October 1972, p. 337

²⁸ Op.Cit 14

²⁹ Comments of the Staff of the Bureau of Economics, Bureau of Consumer Protection, and Office of Policy Planning of the Federal Trade Commission, BEFORE THE OFFICE OF MANAGEMENT AND BUDGET; *In the Matter of* Agency Information Collection Activities; Submission for OMB Review; Comment Request; Assessment of Physician and Patient Attitudes Toward Direct-to-Consumer (DTC) Promotion Drugs; Survey, Docket No. 01N-0078, September 24, 2001

Comparative advertising, when truthful and non-deceptive, 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.³⁰

Advertising is so important to competition that the FTC regularly enforces the antitrust laws against efforts to suppress it. For example, the FTC objected to a group of automobile dealers agreeing not to advertise in a newspaper which had offended them with an article on how to negotiate car prices.³¹ In commenting on the case, the FTC Chairman Robert Pitofsky said:

By ensuring consumer access to advertising, this antitrust case is as important to consumers as the cases we bring to ensure that advertising is true and not deceptive. Advertising is a key source of price and other information and when competitors band together to restrict it, consumers lose.³²

Commission staff have also been strong advocates of truthful, direct to consumer advertising of drugs and health claims. In comments to the FDA, in 1996, they supported this position, writing, “We believe that truthful and non-deceptive DTC advertising can contribute to consumers’ health information environment and consumer welfare.”³³ They also provided further elaboration:

Truthful and non-misleading advertising can help consumers manage their own health care. Advertisements can, for example, provide timely information regarding medical advances, remind consumers about good health care practices, and supply information needed by consumers to understand and evaluate their physician’s recommendations.³⁴

The FTC reiterated these conclusions in comments to the FDA in 2002:

In short, the evidence currently available suggests that DTC advertising has had positive effects. DTC advertising appears to prompt consumers to seek out information about medications and medical conditions, some of which may not have been diagnosed previously. The information that consumers acquire may allow them to have enhanced conversations with their doctors about treatment options and may permit them to make better-informed health

³⁰ STATEMENT OF POLICY REGARDING COMPARATIVE ADVERTISING, FEDERAL TRADE COMMISSION, WASHINGTON, D. C. 20580, August 13, 1979

³¹ In re: Santa Clara Motor Car Dealers Ass’n, 120 F.T.C. 1032, December 13, 1995, Consent Order

³² F.T.C. Press Release, Santa Clara County, Auto Dealers Association Settles Charges over Alleged Advertising Boycott, August 1, 1995

³³ In the Matter of Direct-to-Consumer Promotion; Public Hearing Docket No. 95N-0227, Comments of the Staff of the Bureau of Consumer Protection and the Bureau of Economics of the Federal Trade Commission, January 11, 1996 accessed at <http://www.ftc.gov/be/v960001.htm>

³⁴ Ibid

care decisions for themselves. The cost of providing the information appears to be low.³⁵

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MPA supports truthful DTC advertising. As these comments show, it provides information critical to letting Americans participate in and manage their health care. It also reduces the prices of prescription drugs. The FTC should continue to be a strong proponent of this advertising.

Sincerely,

James R. Cregan
Executive Vice President

³⁵ Comments of the Staff of the Bureau of Economics, the Bureau of Consumer Protection, and the Office of Policy Planning of the Federal Trade Commission before the Department of Health and Human Services, Food and Drug Administration, in the Matter of Request for Comment on First Amendment Issues, Docket No. 02N-0209, September 13, 2002, page 31.