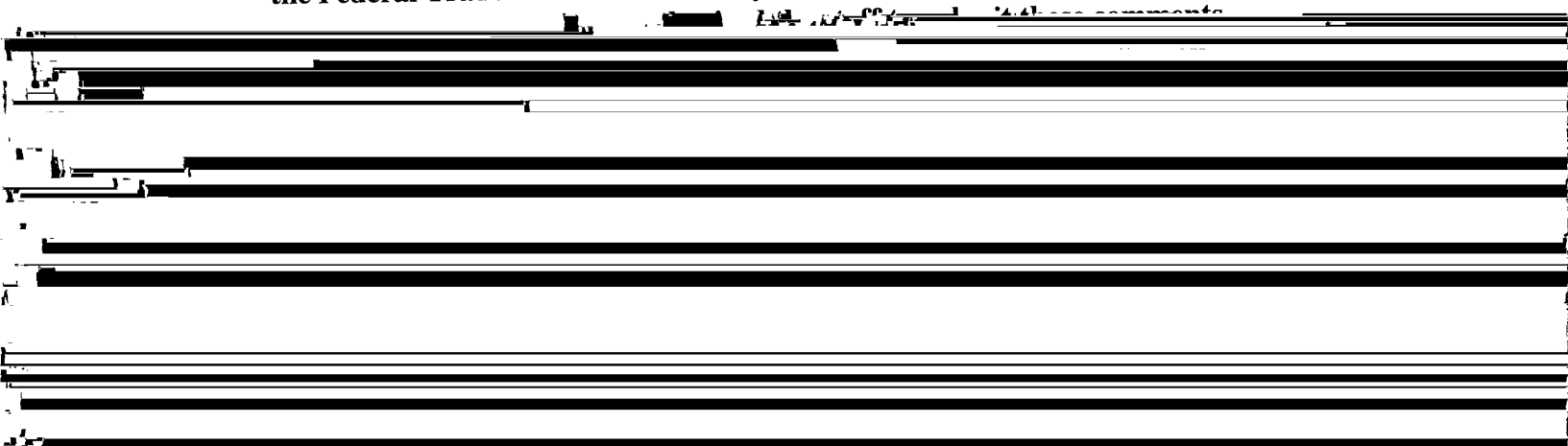


**BEFORE THE
DEPARTMENT OF THE TREASURY
UNITED STATES MINT**

**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*

***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**



I. INTRODUCTION

Section 6 of the Bureau of Consumer Protection Bureau of Economics, and Office of

submit these comments in response to the notice of proposed rulemaking regarding the

Section 6 of the Bureau of Consumer Protection Bureau of Economics, and Office of the United

11. Buttons, initials, symbols, emblems, letters, seals, or badges; or any colorable

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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

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.

³ The D.C. Circuit held that because the government had not considered

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

promotion of food.²⁰ The court explained that the First Amendment commercial speech doctrine

embodies a "preference for disclosure over outright suppression."²¹ "[W]hen government

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

with respect to a product or service.²⁵ In evaluating advertising, the Commission looks to the

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

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

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.

Respectfully submitted,

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