

Trans Atlantic Consumer Dialogue
Chairman William E. Kovacic
U.S. Federal Trade Commission
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*Institutional Innovation and the Future of Consumer Protection Policy*¹

I. Introduction

When we speak of consumer protection, we tend to focus on developments in doctrine or policy. We pay relatively less attention to the institutional arrangements through which policy and doctrine are formulated and through which a system of consumer protection laws is implemented. In addition to the statutes that define our powers and our capacity to obtain remedies, these arrangements include the manner in which our agencies set priorities, organize their operations, acquire knowledge about commercial phenomena, and collaborate with other government and nongovernment bodies having shared interests.

To an increasing degree, consumer protection authorities throughout the world have come to appreciate how the quality of institutional arrangements deeply influence the substantive results that a consumer protection system, or group of consumer protection systems can deliver. Today I want to focus on how institutional reforms have improved the consumer protection programs of the U.S. Federal Trade Commission (FTC) in recent decades and to underscore the need for continuing improvements. I will first identify lessons that I derive from modern FTC experience and then will discuss approaches the Commission can take to improve its capacity to perform its responsibilities effectively. As one step to this end, I will describe how the FTC in the months ahead will perform a basic self assessment to identify, in the years leading to its centennial in 2014, how to achieve the destiny our Congress intended for it to achieve.

II. Lessons Learned

To a great degree, the FTC set out on the path of institutional reform out of desperate necessity roughly forty years ago. In 1969, two studies of the Commission – one performed by researchers organized by Ralph Nader and one conducted by a blue ribbon panel created by the American Bar Association – evaluated the agency in dismal terms. Congress seriously considered the possibility of dismantling the agency and distributing its powers to other government bodies. It chose instead to give the agency another opportunity, perhaps a final chance, to improve its performance.

This life-threatening experience galvanized the Commission to strengthen its institutional capacity to perform its competition policy and consumer protection duties. As the FTC was repairing its own house, Congress dramatically enhanced its powers. Key among the legislative

¹ I thank Yael Weinman for her excellent assistance in preparing this presentation.

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4 *See* <http://www.ftc.gov/bcp/workshops/carbonoffsets/index.shtml>

5 *See* <http://www.ftc.gov/bc/healthcare/hcd/index.shtm>

6 *See* <http://www.ftc.gov/bcp/workshops/mobilemarket/index.shtml>

Town Hall, the FTC released a set of proposed principles to guide the development of self-regulation for behavioral advertising. We continue to seek comments on these proposed guidelines. The deadline is April 11, 2008; we welcome your contributions.

Our ability to study market developments also benefits from our capacity to compel firms to provide information. The FTC Act provides the agency with a powerful information collection tool. Section 6(b) of the Act gives us the authority to require companies to respond to specific inquiries for the purpose of obtaining information about their business practices.⁸

Last July, we used this authority to issue requests to 44 food and beverage and fast food companies to collect information about their advertising and marketing activities.⁹ We will use this information to assist us in preparing a report to Congress about the food industry marketing activities and expenditures. The report will be published in the Federal Register and will be available on the FTC website. This information has received extensive attention in the United States and abroad. We currently are reviewing the information we have collected, and we expect to issue our report this Summer.

B. Consult and Cooperate with Public Agencies and NGOs

Building knowledge by itself does not improve the quality of public policy. It is what you do with the information that really counts. From past experience, we have learned that some of the best applications of our accumulated knowledge involve cooperation with other government agencies at home and abroad.

Our most extensive experiences involving intergovernmental cooperation involve other public authorities in the United States. A recent success was the development of a joint

⁸ 15 U.S.C. § 46.

⁹ See http://www.ftc.gov/os/6b_orders/foodmktg6b/index.shtml

¹⁰ See <http://www.idtheft.gov>

A topic of particular longstanding interest to the global consumer protection community is food marketing to children. While some may view government regulation as the appropriate solution to the problem of childhood obesity, our experience has indicated the problem's causes are too complex to be solved by one approach alone. This is partly a function of our framework of constitutional protections for speech. Under the First Amendment to the Constitution, any government-imposed limit on advertising that is not deceptive must be based on a showing that the restriction would directly advance a substantial state interest and that the interest could not be served as well by less speech-restrictive, or non-speech-restrictive, limitations on commercial speech. This is a formidable requirement.

We have a vital stake in improving the diet and health of our children. Yet crafting restrictions on advertising that could be shown directly to advance that interest likely would be a daunting task. For that reason, we have pursued, and are encouraged by, self-regulatory initiatives such as the Children's Food and Beverage Advertising Initiative launched in late 2006 by the Council of Better Business Bureaus and the BBB's National Advertising Review Council.¹³ Thirteen major food companies are now participating. Most of these companies have pledged to limit their advertising to children under 12 to only those foods meeting specific calorie or nutritional standards. Three have pledged not to direct any advertising to children under 12

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See

<http://www.us.bbb.org/WWRoot/SitePage.aspx?site=113&id=b712b7a7-fcd5-479c-af49-8649107a4b02>

potentially cause significant harm to consumers, consumer redress and disgorgement have been inadequate. Authority to obtain civil penalties would be a useful addition to our portfolio of policy tools.

3. Innovations in Consum

¹⁷ See <http://www.wemarket4u.net/fatfoe/>

¹⁸ 16 C.F.R. 310.

In today's world, companies are expected to compete in providing telecommunications services. Technological advances have blurred traditional boundaries between