

**KEYNOTE REMARKS* OF
COMMISSIONER JANET D. STEIGER
AT THE PRACTICING LAW INSTITUTE'S CONFERENCE ON
"FALSE ADVERTISING AND THE LAW: COPING WITH TODAY'S CHALLENGES"**

SEPTEMBER 17, 1996

NEW YORK, NY

Good afternoon. It is a pleasure to be here today at the Practicing Law Institute's program, "False Advertising and the Law: Coping with Today's Challenges." Before I begin, let me make the standard disclaimer that the views I express today are my own and do not necessarily reflect the views of the Commission or any other Commissioner. Also, I should note that in my remarks today I will be mentioning specific Commission actions by way of illustration and not to single out any individual entity.

Today I would like to share with you some general thoughts about how the FTC's roles in advertising regulation are evolving, what that means for the future of the FTC program, and what it could mean for the advertising industry. In looking at the changing roles of the FTC, I think you will see that the FTC must assume new roles as well as discharge its old ones and that this provides challenges and opportunities both for the Commission and industry in general.

I. Role One: Continue to discharge traditional advertising law enforcement function

The Commission's principle and most visible role is its "traditional " advertising law enforcement function. The FTC is charged with protecting consumers from "unfair methods of competition" and "unfair or deceptive acts or practices" in the marketplace.⁽¹⁾ Although the Commission seeks to foster a national advertising environment that is both competitive and creative, at the same time, it requires that all claims be nondeceptive and substantiated. This is true regardless of whether you use print or broadcast ads or whether you advertise on the Internet.

In my view, it is essential that we maintain the current market-oriented system of advertising regulation that has developed under the FTC Act. The Commission is very active in this and, I must also say, very successful in our law enforcement efforts. We currently have a number of matters in part III adjudication before Administrative Law Judges. Although I am not at liberty to talk about any of these cases in detail, I can say that some of the other alleged unsubstantiated claims that are the subject of litigation involve a wide range of products -- weight-loss programs and services,⁽²⁾ engine treatment additives,⁽³⁾ after-market brake products,⁽⁴⁾ and back-pain remedies⁽⁵⁾ -- and a wide range of issues from traditional ad interpretation and substantiation issues, to questions of what remedies are appropriate from trade name excision⁽⁶⁾ to corrective advertising.⁽⁷⁾

In addition to our litigation, we continue to be very active in investigating potential deceptive advertising cases. As in the past, the focus of these investigations is on claims that involve the potential for substantial consumer harm -- those involving health and safety -- and where there is the greatest economic injury. In the past year the Commission resolved alleged charges involving dietary supplement advertising,⁽⁸⁾ advertising for high octane gasoline claims,⁽⁹⁾ computers,⁽¹⁰⁾ toys,⁽¹¹⁾ and allegedly deceptive environmental marketing.⁽¹²⁾ In the food area, we have challenged a number of claims regarding the levels of "fat,"⁽¹³⁾ "cholesterol,"⁽¹⁴⁾ and "calories."⁽¹⁵⁾ We continue to bring cases involving alleged deceptive product demonstrations⁽¹⁶⁾ and cases where advertisers allegedly deceptively used survey data.⁽¹⁷⁾ Moreover, in cases where an advertising agency helped create advertising that it knew or reasonably should have known was deceptive or unsubstantiated, we have held advertising agencies accountable.⁽¹⁸⁾

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In determining the appropriate remedy, the Commission first seeks to protect consumers from future false and unsubstantiated claims by prohibiting the false claim and requiring substantiation. Moreover, the Commission almost always imposes some degree of fencing-in relief that covers claims or products that go beyond the alleged complaint. For example, in the Stouffer case where Stouffer was found to have made deceptive low-sodium claims, the order prohibits the misrepresentation of the existence or amount of sodium or salt or any other nutrient or ingredient.⁽¹⁹⁾ The factors we consider in crafting fencing-in relief include the seriousness and deliberateness of the violations, the respondent's past history of violations, and the transferability of the violations to different products. We try to phrase the claims coverage broadly enough so that it cannot be evaded by simply changing a few words. Injunctive relief may also require that specific disclosures be made where they are necessary to correct deception. In rare but appropriate cases, the Commission seeks corrective advertising,⁽²⁰⁾ and in situations where the Commission has alleged dishonest and fraudulent conduct, redress or disgorgement may be ordered.⁽²¹⁾

When a company violates an existing administrative order the Commission refers the matter to the Department of Justice and seeks civil penalties for violations of that order. In the past several years, we have obtained the highest civil penalties ever for violations of administrative orders. In Dahlberg, we alleged that misrepresentations were made regarding the Miracle Ear Clarifier in violation of a 1976 order which prohibited misrepresentations regarding the performance of the company's product. We obtained a \$2.75 million civil penalty -- the largest ever in a consumer protection case.⁽²²⁾ In 1994, the Commission obtained \$2.4 million in civil penalties from General Nutrition Corporation for its alleged violation of an existing order.⁽²³⁾ Just recently, Hasbro, Inc., agreed to pay \$280,000 in civil penalties to settle charges that it violated a 1993 consent order by representing that children can operate the "Colorblaster" paint sprayer with little or no effort.⁽²⁴⁾ You will, I think, continue to see a trend toward larger civil penalties for order violations.

II. Role Two: Educate ourselves about the Future

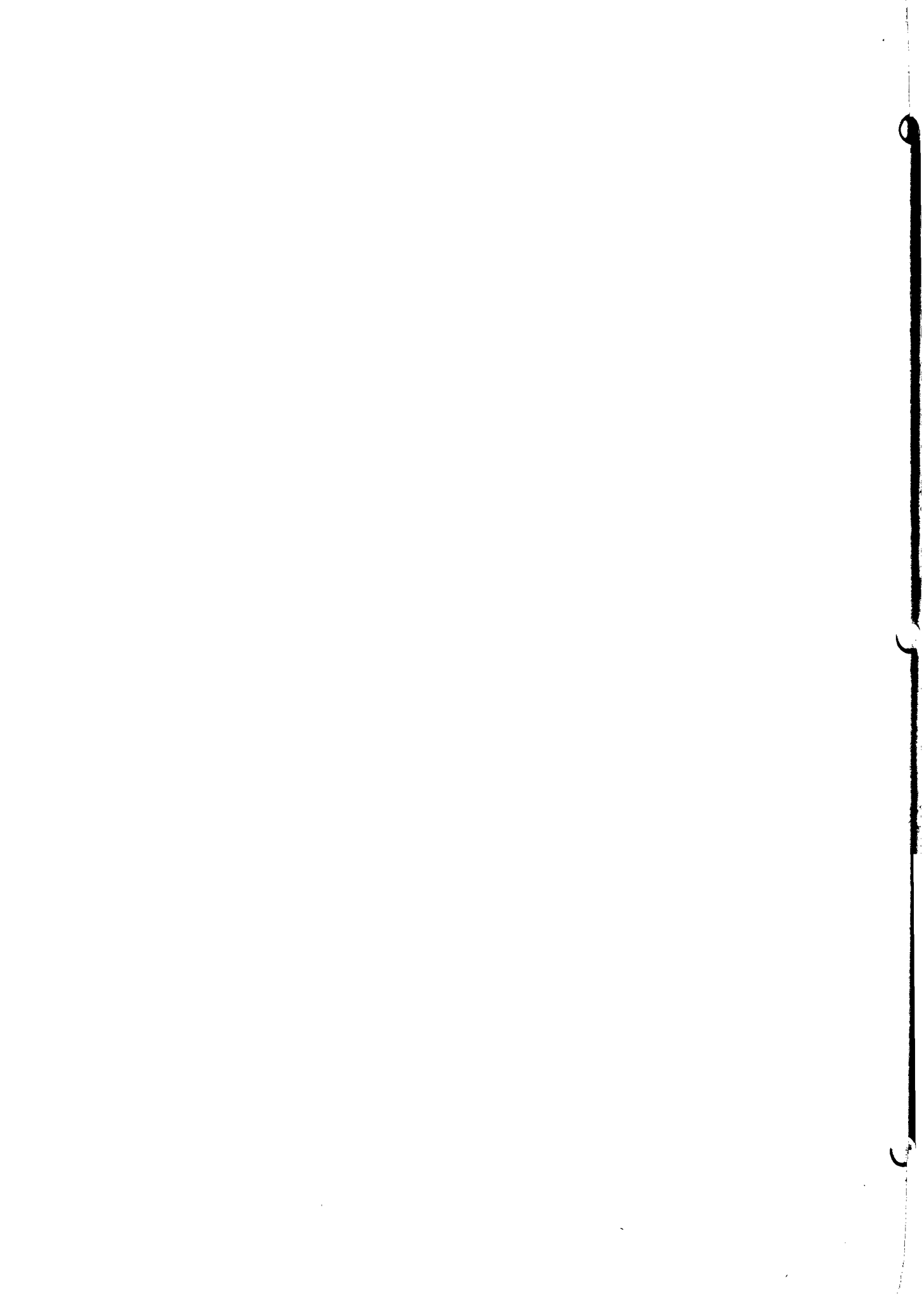
When you examine our recent cases, you will see a great many -- perhaps too many -- familiar issues. Much of that may be changing in the future however. Therefore, a second major challenge for the Commission is to educate ourselves about the future. We simply must be prepared to deal with new consumer protection issues rapid developments in technology will be bringing.

We have seen the benefits of careful evaluation and education pay off time and again. You may recall the very successful open hearing process that led to the adoption of the Commission's Environmental Advertising Guidelines⁽²⁵⁾ and rulemakings to address the 900 numbers⁽²⁶⁾ and telemarketing fraud.⁽²⁷⁾ We are finding public hearings and workshops increasingly useful -- especially for identifying potential consumer protection issues that may not have emerged full blown in the marketplace.

Last fall, you may recall the Commission held hearings entitled "Anticipating the 21st Century: Competition and Consumer Protection Policy in the New High-Tech, Global Marketplace."⁽²⁸⁾ Four days of hearings explored consumer protection issues in the emerging technology-based marketplace. The consumer protection segment of the hearings focused on the telephone, television, and computers -- three rapidly evolving communications technologies. Our goal was to look ahead to learn about how these technologies are developing and how they are used to market goods and services. We also wanted to identify significant consumer protection issues associated with the new technologies. And, of course, we were interested in how we can best address these emerging issues.

At the Global Hearings, more than 70 experts in many fields such as law, business, technology, economics, marketing, consumer behavior, and consumer education appeared before the Commission. Their testimony provided a very rich record. The Commission's staff produced a very useful report that followed the hearings and identified a number of themes. Among them:

- Information technologies are developing at a dizzying pace;
- The technologies may change the marketplace significantly for consumers -- giving them access to



potentially unlimited amounts of information, a global marketplace, and more shopping convenience;

- New technologies may provide fertile ground for old-fashioned scams;
- New technologies are pushing some consumer issues such as privacy, security, and marketing to children to the forefront of public debate; and
- Government law enforcement agencies will have increased challenges at a time when resources are stretched.

One of the goals of the hearings and the report was not only to help educate the Commission about the future, but to serve as a basis for future dialogue and collaborative efforts by all of those with a stake in consumer protection issues. We think that this has been successful. There are ongoing dialogues between Commission staff and the industry on a variety of issues. And just last week, state and federal consumer protection officials from the United States and Canada met in Vermont to address cross-border fraud and similar "global" enforcement issues.

Last June, the Commission held a one and a half day workshop on privacy issues and the Internet with one morning specifically devoted to children's privacy and the Net.⁽²⁹⁾ The conference demonstrates that advertisers and marketers are only beginning to explore the potential for their business in cyberspace. Again, this workshop and others have proven to be an excellent opportunity for the Commission to gain valuable information to assist us in doing our job better.

III. Role Three: Deal with New problems as they emerge

A third role for the Commission is dealing with new problems as they emerge. I believe that the Commission is ideally suited to confront new problems or issues and we have done so. Our statutory mandate -- to protect consumers from unfair or deceptive acts or practices -- has proven to be both broad and flexible over time. Although there are a few statutory exemptions from our jurisdiction, the Commission's authority touches on almost every aspect of our economy. Even in areas where the FTC has no direct jurisdiction, our principles often serve as a model for actions by states and other enforcement officials.

As new issues emerge, however, there is always a dilemma as to how best to deal with them -- through self-regulation efforts or FTC action. We know that as new technologies develop, it is often the unscrupulous who first attempt to use and abuse the mediums. The FTC has a good track record of applying Section 5 to meet the problems created by new technologies, new forms of communication, and new marketing strategies. Our experience with 900 Numbers and infomercials provide successful examples of that. In both those areas the Commission was quick to act when we became aware of marketing abuses that were causing significant consumer injury. At the same time, industry itself is often aware of potential problems in emerging technologies before we are.

One good example is consumer privacy and the Internet. Two sentences frame the issue. The Internet as a new marketing phenomenon has brought a renewed focus and urgency to questions regarding personal privacy and to what extent it can or should be protected. Marketers may soon be able to micro target consumers and to collect and use richly-detailed personal information based in part on where the consumer browses on the Internet.

There seems to be a general consensus that educating both businesses and consumers about online information issues is critical. Likewise, there appears to be agreement that the business community should establish policies about the collection and use of personal information online. Although there is a potential in many of the developing technologies to give consumers significant choice about to whom they disclose information and how such information is used, there is much less agreement on the question of how these goals can be attained. For example, should consumers be required to opt-in to information collection and use or just be given the opportunity to opt-out? Should the first step be industry self-regulation or government involvement? Will technological approaches address most privacy concerns or is something more needed?

One particular privacy issue of special concern to me is the collection of information directly from

children. Information submitted to the Commission indicates that some Internet marketers are seeking very detailed information directly from children as young as four or five. Historically, marketers have dealt with children through or with the express or implied consent of their parents. Although the issue of data collection from children exists in traditional marketing as well as online marketing, special concerns regarding online marketing have to do with the detail of the information collected, the ease and speed with which it is collected, and the security of the data is after it is collected.

At our Internet workshop in June there was a consensus that for children age 12 and under, parental consent is needed. It was not clear, however, how industry should implement this principle. Although there is software that attempts to prevent access to objectionable sites or through other means -- sort of a parental control switch or V-chip for the computer -- this technology and its reliability is untested. The Direct Marketing Association, the Interactive Services Association, and a broad coalition of major advertisers and advertising agencies are all working on developing industry guidelines to respond to consumer privacy concerns. Despite our historical involvement in some areas of privacy, the exact role for the Commission in this new frontier is unclear. I can say, with some assurance, that where the Commission finds a pattern or practice of unfair or deceptive acts that are causing consumer injury, we will act.

IV. Implications of these roles

The balancing of these three roles has implications for the Commission, for the FTC's advertising program, and for advertisers. As the roles of the Commission evolve, one thing seems to never change and that is that our responsibilities become greater and greater. All this occurs at a time of declining resources and ever tighter budgets. The problem of coping with fixed resources is a problem government has been faced with for some time and one with which I struggled during my entire term as chairman. One response, of course, is that we must be selective about what we do. Commission resources need to be expended only where Commission action will make a difference. Another part of the solution is to leverage our scarce resources by working with other law enforcement agencies, encouraging more and better self regulation, and looking for consumer education opportunities. We must also be certain that our law enforcement actions provide the most appropriate remedy. Although I am hopeful that the agency's resources will remain relatively stable, we must be ever vigilant that we are doing the best that we can in bringing cases and providing the appropriate guidance.

We must continue to work even closer with the states, other federal agencies and other law enforcement agencies that can assist us. One area of the Commission's work where we have been especially successful is in the telemarketing fraud area where we have worked closely with other law enforcement agencies in bringing a series of cases at one time. As a result, the Commission has brought a number of "sweeps" targeting franchise and business opportunity frauds, advance fee loan frauds, toner phone frauds, and credit repair scams. Although this approach may not be appropriate for all of the Commission's law enforcement efforts, it has been very effective in the fraud area.

We must also encourage more and better self-regulation. Here the advertising industry has much of which to be proud. The National Advertising Division of the Better Business Bureau is an excellent example of a successful self-regulatory approach. The fact that year in and year out major national advertisers agree to comply with decisions of this self regulator demonstrates how strongly the industry as a whole values truthful standards. Moreover, the fact that this system acts in sixty days and handles hundreds of cases that would otherwise clog the courts and agencies produces real benefits to businesses, consumers, and government.

Another vital part of the advertising self-regulation system is media screening.⁽³⁰⁾ Many media do a good job here. Some media need to do more. This became readily apparent at the Commission's Global Hearings last fall when we learned that while network television, which screens its advertisements, enjoyed 92 percent of prime time TV usage in 1965, today it accounts for a mere 56 percent. In 1965, only 5 percent of consumers had cable TV. Today 63 percent do. In 1965, the average number of channels available to consumers was seven; today it is 41. This has some very clear implications for the FTC's traditional approach to ad monitoring. Indeed, during the past year, we have brought a number of cases that illustrate that some fairly obviously deceptive ads are slipping through the cracks. Thus, you

will see the Commission encouraging better screening of advertising for deception before it is broadcast on any media.

Dietary supplements is another area where our staff has been encouraging the industry to take greater self-regulatory efforts. As American consumers become increasingly health conscious, we have seen a proliferation of advertising and a profusion of claims in this area. In fact, the issues closely resemble the trends we saw in environmental marketing in the late 1980's. It seems a perfect opportunity for the industry to take some significant self-regulatory steps.

In addition to being a long time supporter of self-regulation, I have also been a strong believer in consumer education. Now more than ever I believe that you will see the Commission taking every opportunity to promote consumer education.

Just recently the Commission brought a number of cases involving scholarship scams. We targeted cases where for an up-front fee, students were guaranteed a scholarship or grant for their higher education. In addition to the cases filed, a massive consumer education campaign has been undertaken to educate consumers about scholarship scams directed at young people and their families who are seeking ways to pay for their higher education. In this effort the Commission worked with Sallie Mae, the National Association of Student Financial Aid Administrators, and other education experts and associations⁽³¹⁾ in creating and disseminating public service announcements, posters, fliers, and bookmarks to be distributed in mailings and in campus book stores. In addition to using the traditional media, we have made extensive use of our Internet site and with links to other relevant sites. Obviously not all cases will justify such a campaign, but this effort illustrates not only the importance the Commission places on consumer education, but the creativity and resourcefulness of our staff in attempting to reach those who need to be reached.

V. Conclusion

The Commission will meet the challenges the end of the twentieth century brings us. Our tools have proven to be flexible and adaptable in the past, and they will hold us in good stead in the future. We have a strong tradition of rational law enforcement and an excellent track record in acting judiciously and effectively. However, we are always looking for ways to do our job better, and along those lines, we continue to work with the states and other government entities in bringing enforcement actions. We maintain an open dialogue with industry and consumer groups. But, in order to keep pro-competitive advertising viable, it takes all of us acting responsibly, sensibly, and cooperatively.

Footnotes:

* The views expressed are those of the Commissioner and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner or staff.

1. 15 U.S.C. 45(1)

2. *Jenny Craig, Inc.*, D. 9260 (Sept. 24, 1993) (complaint issued)

3. *Quaker State - Slick 50, Inc.* D 9280 (July 12, 1996) (complaint issued)

4. *Automotive Breakthrough Sciences, Inc.*, D.9275 (Sept. 27, 1995) (complaint issued); *BST Enterprises, Inc.*, D.9276 (Sept. 27, 1995) (complaint issued); *Brake Guard Products, Inc.*, D.9277 (Sept. 27, 1995) (complaint issued)

5. *Ciba-Geigy Corp.*, D. 9279 (June 26, 1996) (complaint issued)

6. *Metagenics, Inc.*, D. 9267 (Aug. 19, 1994) (complaint issued)

7. *Ciba-Geigy Corp.*, *Automotive Breakthrough Sciences, Inc.*, *BST Enterprises, Inc.*, *Brake Guard Products, Inc.*

8. *Home Shopping Network, Inc.*, D. 9272 (July 11, 1996) (consent agreement subject to final approval)

9. *Amoco Oil Co.*, C-3655 (May 7, 1996) (consent); *Unocal Corp.*, C-3493 April 28, 1994)

10. *Synchronys Softcorp*, File No. 9623002 (July 10, 1996) (consent agreement subject to final approval)
11. *Azrak-Hamway International, Inc.*, C-3653 (May 2, 1996) (consent); *US v. Hasbro, Inc.*, No. 96-451P (D.R.I. Aug. 6, 1996) (stipulated permanent injunction and \$280,000 civil penalty); *US v. Hasbro, Inc.*, No. 93-0212 (D.R.I. May 10, 1993) (stipulated permanent injunction and \$175,000 civil penalty) and *Hasbro, Inc.*, C-3447 (July 2, 1993) (consent)
12. *Safe Brands Corp.*, C-3647 (Mar. 26, 1996) (consent); *Amoco Oil Co.*
13. *Mrs. Fields Cookies, Inc.*, C-3657 (May 13, 1996) (consent); *The Dannon Co.*, C-3643 (Mar. 18, 1996); *Good News Products, Inc.*, C-3642 (Feb. 22, 1996) (consent); *Haagen Dazs Co.*, C-3582 (June 2, 1995) (consent)
14. *US v. Egglan's Best, Inc.*, No. 96 CV-1983 (E.D. Pa. Mar. 12, 1996) (stipulated permanent injunction and \$100,000 civil penalty for violation of previous order in *Egglan's Best, Inc.*, C-3520 (Aug. 15, 1994) (consent); *Good News Products, Inc.*
15. *Mama Tish's Italian Specialties, Inc.*, C-3644 (Mar. 19, 1996) (consent); *The Dannon Co.*, C-3643 (Mar. 18, 1996) (consent); *The Eskimo Pie Corp.*, C-3597 (Aug. 11, 1995) (consent)
16. *Azrak-Hamway International, Inc.*; *US v. Hasbro, Inc.*, No. 96-451P; *US v. Hasbro, Inc.*, No. 93-0212; *Hasbro, Inc.*, C-3447 (July 2, 1993) (consent)
17. *NordicTrack, Inc.*, C-3675 (June 17, 1996) (consent); *J. Walter Thompson USA, Inc.*, C-3622 (Oct. 20, 1995) (consent)
18. *Jordan, McGrath, Case & Taylor, Inc.*, File No. 9623053 (June 26, 1996) (consent agreement subject to final approval); *Starwood Advertising, Inc.*, C-3654 (May 2, 1996) (consent); *NW Ayer, Inc.*, C-3660 (May 31, 1996) (consent) *J. Walter Thompson USA, Inc.*; *Young & Rubicam, Inc.*, C-3680 (Aug. 22, 1996) (consent)
19. *Stouffer Foods Corp.*, Dkt. 9250 (Sept. 26, 1994) slip op
20. *Warner-Lambert Co.*, 86 F.T.C. 1398 (1975), *aff'd as modified*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), *modified*, 92 F.T.C. 191 (1978); *Egglan's Best, Inc.*
21. *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1993); *FTC v. Figgie Int'l., Inc.*, 944 F.2d 595 (9th Cir. 1993)
22. *FTC v. Dahlberg, Inc.*, No. 4-94-CV-165 (D. Minn. Nov. 21, 1995)
23. *US v. General Nutrition, Inc.*, No. 94-686 (W.D. Pa. Apr. 28, 1994)
24. *US v. Hasbro, Inc.*, No. 96-451P (D.R.I. Aug. 6, 1996)
25. Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992)
26. Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. 5701; Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 58 Fed. Reg. 42,364 (Aug. 9, 1993), 16 CFR Part 308.
27. Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. 6101; Telemarketing Sales Rule, 60 Fed. Reg. 43,842 (Aug. 23, 1995), 16 CFR Part 310.
28. Available on the Internet at the FTC's World Wide Web site, <http://www.ftc.gov>.
29. Available on the Internet at the FTC's World Wide Web site, <http://www.ftc.gov>.
30. See Federal Trade Commission, et al., "Proceedings on the Conference on Preventing Fraudulent Advertising: A Shared Responsibility," Arlington, Va. Apr. 21, 1995, available on the Internet at the FTC's World Wide Web site, <http://www.ftc.gov>.
31. National Association of Student Financial Aid Administrators; American Council on Higher Education; National Association of Independent Colleges and Universities; American Counseling Association; National Association of Secondary School Principals; Educational Testing Services; ACT, Inc. (formerly, American College Testing Service); The College Board; National Association of College Stores; National Association of College Admissions Counselors; Student Loan Marketing Association (Sallie Mae); Interactive Services Association; and National Association of College Students.