The Federal Trade Commission's Deception Enforcement Policy

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COMMENTS

THE FEDERAL TRADE COMMISSION'S DECEPTION ENFORCEMENT POLICY

In 1983, the Federal Trade Commission (the Commission), under the direction of Chairman James C. Miller III, announced an enforcement policy to protect consumers against deceptive acts and practices in advertising. The Commission's Deception Enforcement Policy (the Policy), which includes a reformulated definition of deception, has generated considerable


2. James C. Miller III was appointed to the Commission on June 26, 1981 by President Reagan. At the time, Miller was the head of the regulatory policy branch of the Office of Management and Budget (OMB), and was also executive director of the cabinet-level task force on regulatory relief. Wall St. J., June 29, 1981, at 12, col. 2. Miller was appointed to succeed Commissioner Paul Rand Dixon, who retired in September, 1981. Miller’s appointment was approved by the Senate, 97-2, on September 21, 1981. Wall St. J., Sept. 22, 1981, at 2, col. 3.

3. The reformulated definition of a deceptive act or practice states: "The Commission will find deception if there is a misrepresentation, omission, or other practice, that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." Federal Trade Commission Enforcement Policy letter to Representative John D. Dingell, Chairman, House Comm. on Energy and Commerce, 5 TRADE REG. REP. (CCH) 50,455, at 56,072 (Oct. 31, 1983) [hereinafter cited as Policy]. According to Commissioners Bailey and
controversy. Since the Policy was not adopted through established administrative agency rulemaking or adjudicative proceedings, the public never had a chance to participate in its creation. The Policy also does not accurately restate prior case law on deception. Despite these defects, however, the Policy has already begun to reshape the law of deception in consumer advertising.

This Comment analyzes the Commission's Policy and explores its impact on FTC proceedings. Part I examines the evolution of the Commission's deception standard as a frame of reference for a critique of Chairman Miller's Policy, and discusses the Commission's authority to enforce the deception policy through adjudication and rulemaking. Part II analyzes the current Policy and its departure from prior case law on deception in advertising. Finally, Part III discusses the Policy's ramifications on the Commission's enforcement efforts against deceptive practices, based upon four Commission cases decided under the new Policy.

I. THE COMMISSION'S AUTHORITY TO REGULATE DECEPTIVE PRACTICES

A. Evolution of the Commission's Advertising Deception Policy

The Federal Trade Commission Act (FTC Act), which authorizes the Commission's existence, has gradually developed from its origins as an antimonopoly law into a full-blown consumer protection statute. When the FTC Act was adopted in 1914, it barred only those acts and practices of advertisers that allegedly had adverse effects on competition. The Act did not proscribe

Pertschuk, the dissenters against the Policy statement, the previous deception standard provided "that an act or practice is deceptive if (1) it has the tendency or capacity to mislead (2) a substantial number of consumers (3) in a material way." Bailey & Pertschuk, The Law of Deception: The Past as Prologue, 33 Am. U.L. Rev. 849, 850 (1984) (examines the Policy as a device to narrow traditional Commission deception authority).

The Policy letter was written by Chairman Miller at the request of Representative Dingell, who wanted to resolve some doubts that the Committee members had about the law of deception. H.R. REP. NO. 156, 98th Cong., 1st Sess. 6 (1983). Representative Dingell responded to the letter by rejecting its findings. Letter from Representative John D. Dingell to Chairman James C. Miller III, 5 TRADE REG. REP. (CCH) 50,455, at 56,086 (Oct. 31, 1983). In his letter to Chairman Miller, Dingell stated in part:

We requested a disciplined, in-depth review of what decades of case law stand for, and of the nature and amount of evidence of deception considered by the Commission during fifty years of litigation in the public interest. What you delivered is a document that addresses not what the Commission's deception jurisdiction is, but what some now at the agency want it to be.

Id. Although Chairman Dingell requested a more responsive reply to his initial inquiry, the full Commission has yet to provide one.

4. See infra notes 67-83 and accompanying text.
5. See infra notes 63-66 and accompanying text.
6. See generally infra notes 97-172 and accompanying text (tracing distinctions between old deception law and Policy restatement).
7. See infra notes 173-216 and accompanying text.
9. Id. at § 45 ("unfair methods of competition in commerce are hereby declared unlawful");
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deceptive acts or practices, and did not recognize or extend direct protection to consumers against deceptive acts. The 1938 Wheeler-Lea Act broadened the FTC Act, principally by adding new sections aimed at consumer protection. Amendments to section five of the Act gave the Commission authority to prohibit deceptive acts or practices in or affecting commerce. Amendments to section twelve also gave the Commission authority to prohibit


11. The term “consumers” refers to retail customers as well as corporations, partnerships, and employees. See, e.g., Universal Credit Acceptance Corp., 82 F.T.C. 570, 643 (1973) (commercial buyers of services and franchises are “consumers”), rev’d in part on other grounds sub nom. Heater v. FTC, 503 F.2d 321 (9th Cir. 1974); American Mktg. Assoc., Inc., 73 F.T.C. 213, 253-54 (1968) (prospective employees of corporation are “consumers”); Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. § 436.2(b) (1985) (protecting any individual, group, association, general partnership, corporation, or other business entity).


The FTC Act’s proscription against deception is based upon the belief that deceptive acts or practices have the following harmful effects: 1) injury to competition, see FTC v. Raladam Co., 283 U.S. 643, 647-48 (1931) (paramount aim of FTC Act is protection of public from evils likely to result from destruction or restriction of competition); 2) injury to consumers, see FTC v. Rhodes Pharmacal Co., 191 F.2d 744, 747 (7th Cir. 1951) (claim of a miracle cure for arthritis and rheumatism could have adverse consequences on consumers because such claims could cause consumers to forego alternative proven methods of treatment); 3) injury to advertising as a source of information, see Beneficial Corporation v. FTC, 542 F.2d 611, 618-19 (3d Cir. 1976) (claim of an “instant tax refund” constituted an erroneous representation because it was a loan secured by the consumer’s tax refund rather than a direct refund), cert. denied, 430 U.S. 983 (1977).
deceptive acts performed by advertisers against consumers. The Wheeler-Lea amendments measurably broadened the authority and responsibility of the Commission, as evidenced by Congress' decision to leave the term "deceptive act or practice" to be defined by the Commission itself. Since 1938, the definition of deception has evolved through the Commission's case-by-case adjudication of allegedly misleading advertisements.

In practice, the Commission has followed four steps in its investigations of deceptive claims. First, the challenged advertisement must make some kind of representation. To be deceptive, an advertisement has to make a representation that can be proven to be deceptive. A challenged representation in an advertisement can be express or implied. To determine what

14. Wheeler-Lea Act of 1938, ch. 49, § 4, 52 Stat. 111, 114 (codified at 15 U.S.C. § 52 (1982)). Section 12 of the FTC Act governs the advertising of food, drug, medical devices, and cosmetics. 15 U.S.C. §§ 52, 55. Section 12(b) of the FTC Act provides that advertisements that violate § 12 of the Act also violate § 5. Id. § 52(b). Section 12 cases are discussed in this Comment only as they relate to the law of deception under § 5.


The lack of a statutory definition of deception has given the Federal Trade Commission wide discretion to apply different standards of deception. For instance, the levels of consumer awareness and intelligence sought to be protected by the Commission has varied in different cases. Compare Standard Oil Co. v. FTC, 577 F.2d 653, 662 (9th Cir. 1978) (holding that a higher level of consumer intelligence was appropriate) with Gelb v. FTC, 144 F.2d 580, 582 (2d Cir. 1944) (standard of deception was based on a very low level of consumer awareness and intelligence). See generally FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (Commission has influential role in interpreting § 5 and applying it to novel cases); FTC v. Morton Picture Advertising Serv. Co., 344 U.S. 392, 394 (1953) (section 5 proscriptions are flexible and have been defined with particularity in numerous cases); FTC v. R.F. Keppel & Brother, Inc., 291 U.S. 304, 312 (1934) (Congress afforded courts flexibility to define "deception" by not rigidly defining § 5 proscriptions).


17. Express representations are misleading if they are contrary to fact. See National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 161 (7th Cir. 1977) (claim that linked egg consumption to heart disease false because no such evidence existed), cert. denied, 439 U.S. 821 (1978); Warner-Lambert Co. v. FTC, 562 F.2d 749, 753-56 (D.C. Cir. 1977) (claim that mouthwash could cure or prevent colds was false), cert. denied, 435 U.S. 950 (1978); Certified Bldg. Prods., Inc., 83 F.T.C. 1004, 1034 (1973) (claim that residential siding would reduce heating costs was false), aff'd sub nom. Thirt v. FTC, 512 F.2d 176 (10th Cir. 1975).

18. See, e.g., Fedders Corp. v. FTC, 529 F.2d 1398, 1402-03 (2d Cir.) (claim was deceptive because it implied that air conditioner performed well in extremely hot weather), cert. denied, 429 U.S. 818 (1976); Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 248 (6th Cir.) (claim
an advertisement represents, the Commission must analyze the overall impres-

that tire was safer than all others because it could stop quicker on all road surfaces, regardless of road conditions, deceptive), cert. denied, 414 U.S. 1112 (1973); National Bakers Serv., Inc. v. FTC, 329 F.2d 365, 366-67 (7th Cir. 1964) (claim that bread had fewer calories per slice than other brands was deceptive because bread was more thinly sliced); Mytinger & Casselberry, Inc. v. FTC, 301 F.2d 534, 540-41 (D.C. Cir. 1962) (claim that United States officially endorsed product was deceptive because alleged endorsement appeared in consent agreement that settled misrepresentation charges).

Express claims about the performance or safety of a product contain implied representations that the claims have been substantiated. If the claims are not in fact substantiated (i.e., supported by a reasonable basis), the advertising may be found to be deceptive. See, e.g., Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 250-51 (6th Cir.) (performance and safety claims about tire's stopping capabilities deceptively implied that they were substantiated by tests), cert. denied, 414 U.S. 1112 (1973); National Dynamics Corp., 82 F.T.C 488, 549-50 (1973) (advertising found deceptive where company conveyed impression to public that it had a reasonable factual basis for making claim), aff'd as modified, 492 F.2d 1333 (2d Cir.), cert. denied, 419 U.S. 993 (1974); see also National Comm'n on Egg Nutrition, 88 F.T.C 84, 191 (1976) (claim based on inadequate or nonexistent substantiation was deceptive because it omitted highly material fact), aff'd as modified, 570 F.2d 157 (7th Cir 1977), cert. denied, 439 U.S. 821 (1978).

19. See also Florence Mfg. Co. v. J.C. Dowd & Co., 178 F. 73, 75 (2d Cir. 1910). When the Commission ascertains a representation's tendency to deceive, it focuses on the entire representation. In the landmark case of Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679-80 (2d Cir. 1944), the respondent represented in its advertising campaign that its skin care product contained rejuvenating qualities for skin. The representations implied that the product contained an element that prevented the skin's natural aging process. Since the court found that no known external application could prevent aging of the skin, the court held that the product's trade name, "Rejuvenescence," was deceptive in light of its denotative meaning of that which restores youth.

Even if an ad or claim contains one or several obvious misrepresentations, it could still not be found to be deceptive if other aspects of the ad or claim substantially correct or nearly correct the misrepresentation(s). Express and implied representations may be qualified by disclosures or disclaimers, although the effectiveness of the disclosure or disclaimer depends on the net impression conveyed. See Standard Oil Co. v. FTC, 577 F.2d 653, 659 (9th Cir. 1978) (Commission properly found "predominant visual message" misleading when not corrected or contradicted by accompanying verbal message); Giant Food, Inc. v. FTC, 307 F.2d 184, 986 (D.C. Cir. 1963) (qualifying statement may not alleviate deception if in fine print and set apart from body of advertisement or if disclosure contributed to deception), cert. dismissed, 372 U.S. 83 (1964); Litton Indus., Inc., 97 FTC 1, 71 & n.6 (1981) (fine print disclosures inadequate to remedy misleading statement made in headline), aff'd as modified, 676 F.2d 364 (9th Cir. 1982); see also Bantam Books, Inc. v. FTC, 275 F.2d 680, 681-82 (2d Cir. 1960) (Commission ordered publisher to print in clear and conspicuous type on cover and title page of any abridged book phrase indicating that book is abridged; legend in small type on bottom of cover inadequate), cert. denied, 364 U.S. 819 (1960); AMREP Corp., 102 F.T.C. 1362, 1646-47 n.47 (1983) (small print disclosure in brochure failed to dispel misrepresentations made in oral sales presentation); Raymond Lee Org., Inc., 92 F.T.C. 489, 618-19 (1978) (ambiguous disclosures in contracts did not counter overall impression created by prior written and oral representations), aff'd, 679 F.2d 905 (D.C. Cir. 1980); Peacock Buick, Inc., 86 F.T.C. 1532, 1554 & n.5 (1975) (subsequent disclosure in financing agreement that cars for sale were used did not cure prior misrepresentation that car was new). Conversely, a single misrepresentation amidst otherwise proper claims may render the entire representation deceptive if the significance of the single misrepresentation taints the other claims.

By examining the representation itself, the Commission is able to determine its meaning and assess its capacity to deceive. See Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977)
sion that is projected by the advertisement from the perspective of the targeted audience. These determinations become part of the administrative record.


21. The FTC has authority to determine the existence and meaning of advertised representations. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 386-87 (1965). In so doing, the Commission may apply its own expertise, but often relies on outside testimony and empirical analysis. See supra note 19. Such outside aids include consumer perception surveys and the advertiser's own copy tests. Consumer survey tests are typically of two types. The first type of consumer surveys are those commissioned by the FTC. See MacMillan, Inc. 96 F.T.C. 208, 273 (1980) (survey of consumer response to extension school advertisement). The second type are those surveys that are conducted by independent research groups or third parties. See Coca-Cola Co., 83 F.T.C. 746, 770 (1973) (survey of consumer response to Hi-C advertisement).

Alternatively, the Commission may rely on an advertiser's own tests, which routinely are conducted by marketers to measure the public's perception of advertised claims. See 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); Bristol Myers Co., 85 F.T.C. 688 (1975); ITT Continental Baking Co., 83 F.T.C. 865 (1973), modified, 532 F.2d 207 (2d Cir. 1976). Although these aids often help the Commission determine the meaning of representations, they are not required to substantiate the Commission's findings. See FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965) (Commission need not conduct survey research before determining that commercials have a tendency to mislead); see also American Home Prods. Corp. v. FTC, 402 F.2d 232, 236-37 (6th Cir. 1968) (customer testimony helpful but not essential), aff'd, 421 F.2d 845 (1970); J.B. Williams Co. v. FTC, 381 F.2d 884, 890 (6th Cir. 1967) (random sample not needed for Commission to determine meaning and impact of advertisements); Zenith Radio Corp. v. FTC, 143 F.2d 29, 31 (7th Cir. 1944) (Commission not required to sample public opinion).

A federal court of appeals may reverse the Commission's finding if it is not supported by substantial evidence. 15 U.S.C. §45(c). See, e.g., Elliot Knitwear, Inc. v. FTC, 266 F.2d 787 (2d Cir. 1959) (court overturned Commission ruling that brand name "Cashmora" was deceptive in that it inferred product was composed of cashmere wool); Allan B. Wrisley Co. v. FTC, 113 F.2d 437, 440 (7th Cir. 1940) (court overturned Commission finding that consumers believed respondent's soap contained 100% percent olive oil). Nevertheless, courts of appeals should
Second, the representation must be false. The boundaries of falsity are broader and more subtle than the parameters of what constitutes blatant lies. An advertisement can be false even if the representations are literally true and the overall content of the advertisement is deceptive.

Falsity includes the use of half-truths, omissions, and ambiguities. Give Commission findings considerable deference on review. FTC v. Mary Carter Paint Co., 382 U.S. 46, 48-49 (1965); accord Simeon Management Corp. v. FTC, 579 F.2d 1137, 1145 (9th Cir. 1978) (FTC is more qualified to determine deception than the courts); Resort Car Rental Sys. v. FTC, 518 F.2d 962, 964 (9th Cir. 1975) (Commission has expertise in assessing deceptive claims).

A representation may be found deceptive if a particular phrase within the representation is subject to more than one interpretation, and one of those interpretations is contrary to fact. See, e.g., Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977) (claim deceptive if it projects some false impression, notwithstanding other true impressions); FTC v. Sterling Drug, Inc., 317 F.2d 669, 674-75 (2d Cir. 1963) (claim deceptive if it has two meanings, one of which is false); Murray Space Shoe Corp. v. FTC, 304 F.2d 270, 272 (2d Cir. 1962) (claim that shoes could relieve pain found deceptive, because claim could imply that shoes had therapeutic value when they did not).

True claims are rarely deceptive. But see Feil v. FTC, 285 F.2d 879, 900-01 (9th Cir. 1960) (claim that product cured bed wetting found misleading because it only worked in half of all cases); Keele Hair & Scalp Specialists, Inc., 55 F.T.C. 1840, 1849-50 (1959) (claim that product could stop or prevent baldness found misleading because product could have no effect on men suffering from male pattern baldness), aff'd, 275 F.2d 18 (5th Cir. 1960); see also Guide Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.2 (1985) (celebrities who endorse products must actually use them, notwithstanding truth of broadcast claims). For a discussion of the Simeon Management decision, see infra notes 55-58 and accompanying text.

The respondent represented that its brand of cigarettes contained “less nicotine, or less tars and resins, or is less irritating to the throat than the cigarettes or the smoke therefrom of any of the six other leading brands of cigarettes.” Id. at 54. The advertisement represented that the claim was based on an impartial scientific study conducted and published by Reader's Digest magazine. Id. at 57. The Commission determined that the claim implied that the respondent's brand of cigarette was a safe product. Id. at 56. Contrary to this implication, the Reader's Digest article reported that all cigarettes, including the respondent’s, were dangerously high in tars and nicotine. Id.

The Chrysler advertisement was ambiguous because it implied that its eight-cylinder engine car was “small” and fuel efficient. Id. at 363. The Administrative Law Judge (ALJ) found that Chrysler inaccurately reported the contents of two Popular Science magazine articles, which stated that Chrysler’s six-cylinder “small cars,” Valiants and Darts, were superior in fuel economy to all Chevrolet Novas. The Chrysler advertisements did not report that the articles covered only six-cylinder automobiles and not Chrysler’s eight-cylinder Valiants and Darts, which were not fuel efficient. Instead, the advertisements ambiguously referred to Chrysler’s lines as “small cars.” Id.

See, e.g., Brite Mfg. Co. v. FTC, 347 F.2d 477 (D.C. Cir. 1965) (importers failed to disclose foreign origin of products on front of packaging, container, or display card of products); Kerran v. FTC, 265 F.2d 246 (10th Cir.) (labels on recycled lubricating oil containers ambiguous because labels did not disclose use of recycled oil and containers were indistinguishable from those containing virgin crude), cert. denied, 361 U.S. 818 (1959).

In Simeon Management Corp. v. FTC, 579 F.2d 1137 (9th Cir. 1978), the respondent advertised that its weight loss program was safe and effective. Id. at 1141. A representative sample of one of respondent’s advertisements is as follows:
Third, a challenged advertisement must have a tendency or capacity to deceive consumers.\textsuperscript{27} Proof of an actual deception or consumer injury is not required to prove deception; the mere showing of a tendency or capacity to deceive is sufficient.\textsuperscript{28} The absence of an actual injury requirement as an element of deception\textsuperscript{29} exemplifies the Commission's effort to take precautionary measures to prevent deception, rather than to compensate injured consumers. Medically supervised weight loss. Lose weight safely, quickly, and effortlessly through our proven weight reduction program developed by Medical Doctors and supervised by our Physicians and Nurses. Simeon Weight Clinics, its Doctors, Nurses and professionally trained staff, bring you a quick and safe way to melt away unwanted pounds.

\textit{Id.} The respondent claimed that a drug, known as human chorionic gonadotropin (HCG), was determined by the Food and Drug Administration (FDA) to be safe and effective. \textit{Id.} at 1145. The Commission found that respondent's failure to disclose that the weight reduction treatments utilized injections of a drug lacking FDA approval for such uses rendered the advertisements deceptive. The Commission therefore held that the ads violated § 5 of the FTC Act. \textit{Id.}

27. See, e.g., American Home Prods. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982) (Commission looks at entire advertisement in determining its capacity to deceive); Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976) (in finding deception, Commission will consider advertisement's tendency to deceive), \textit{cert. denied}, 430 U.S. 983 (1977); United States Retail Credit Ass'n, Inc. v. FTC, 300 F.2d 212, 221 (4th Cir. 1962) (test of deception is whether advertisement has tendency or capacity to deceive); Goodman v. FTC, 244 F.2d 584, 604 (9th Cir. 1957) (capacity to deceive is test for deception); \textit{but see} Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (7th Cir. 1967) (test of deception is whether advertisement has likelihood or capacity to deceive).

28. United States v. Reader's Digest Ass'n., Inc., 464 F. Supp. 1037 (D. Del. 1978). In this case, the action was brought against Reader's Digest magazine for allegedly violating a consent order in which it agreed to cease from using "simulated checks" in its sweepstakes promotions. The "simulated checks" were found to have a tendency or capacity to deceive the public into believing that they were authentic, negotiable instruments.

Furthermore, the Commission may prohibit misleading conduct even if it is performed unintentionally or in good faith. See Chrysler Corp. v. FTC, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977) (good faith will not immunize advertiser from responsibility for its misrepresentations); Feil v. FTC, 285 F.2d 879, 896 (9th Cir. 1960) (existence of good faith immaterial); Ford Motor Co. v. FTC, 120 F.2d 175, 181 (6th Cir.) (good faith of seller not a defense to a § 5 violation), \textit{cert. denied}, 314 U.S. 668 (1941); Travel King, Inc., 86 F.T.C. 715, 773 (1975) (intent to deceive not an element of deception); \textit{cf.} Litton Indus. v. FTC, 676 F.2d 364, 372 (9th Cir. 1982) (circumstances surrounding violation considered in entering remedial order); Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 309 (7th Cir. 1979) (extent of advertiser's fault has bearing on remedy).

29. A requirement of proof of actual injury might also be unduly burdensome and costly to the Commission. For example, in United States v. Reader's Digest, 464 F. Supp. 1037 (D. Del. 1978), the court noted that it was unlikely that the Commission would have undertaken such a broad prohibition of the use of simulated checks in sweepstakes promotions if it had to endure the burden of proving actual deception caused by the use of the checks. \textit{Id.} at 1037, 1052. See American Home Prod. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982) (capacity to deceive may be found without evidence of actual deception); Trans World Account, Inc. v. FTC, 594 F.2d 212, 214 (9th Cir. 1979) (proof of actual deception unnecessary if misrepresentation tends to deceive); Resort Car Rental Sys., Inc. v. FTC, 518 F.2d 962, 964 (9th Cir.) (evidence of actual deception need not be shown in order to find deception), \textit{cert. denied sub. nom.} Mackenzie v. United States, 423 U.S. 827 (1975); Charles of the Ritz Distrib. Corp. v.
consumers.\textsuperscript{30} To prevent deception, and to determine whether a particular representation has a tendency or capacity to deceive, the Commission examines what the advertisement’s effect would tend to be on the audience targeted by the advertiser.

Both the Commission and the advertisers realize that certain groups of consumers have peculiar vulnerabilities.\textsuperscript{31} For example, in \textit{ITT Continental Baking Co. v. FTC},\textsuperscript{32} a baking company represented that its product, "Wonder Bread," contained all of the essential nutrients necessary for the

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\text{FTC, 143 F.2d 676, 680 (2d Cir. 1944) (consumer testimony not required to find deception). Furthermore, as a practical matter, injured consumers are unlikely to admit that they were fooled by claims that advertisers say would deceive only ignorant and credulous people. See, e.g., \textit{Geld v. FTC}, 144 F.2d 580, 582 (2d Cir. 1944) (Commission adequately supported finding of deception with testimony of one witness who said that while she personally was not deceived by respondent’s claim that its hair coloring product was permanent, she believed that others could be).}
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\text{30. The FTC Act is not a penal or revenue raising measure; rather it is an attempt to effectuate the consumer protection policies that underlie fair competition enforcement. United States v. \textit{Saint Regis Paper Co.}, 355 F.2d 688, 693 (2d Cir. 1966). In \textit{Saint Regis Paper}, the respondent violated a cease and desist order restraining it and 16 other competitors from engaging in consort pricing of multiwall paper shipping sacks. \textit{Id.} at 690. The court noted that Congress relied on the flexibility of administrative process and the initiative of administrative officials to promote the policies of fair competition. \textit{Id.} at 693-94. \textit{See Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963) ("[t]he purpose of the Federal Trade Commission Act is to protect the public, not to punish a wrongdoer . . . and it is in the public interest to stop any deception at its incipiency"); accord \textit{Goodman v. FTC, 244 F.2d 584, 602 (9th Cir. 1957); Royal Baking Powder Co. v. FTC, 281 F. 744, 745 (2d Cir. 1922).}
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\text{31. The Supreme Court, for example, has accepted a Commission finding that children are peculiarly vulnerable to deceptive acts and practices. See \textit{FTC v. R.F. Keppel & Brother, Inc.}, 291 U.S. 304, 313 (1933) (children are susceptible to deceptive advertising because of their inability to protect themselves). The Commission also has noted the particular vulnerability of children to deceptive advertising practices:}
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\text{Thus, throughout the law in general and under Section 5 of the [Federal] Trade Commission Act in particular, it has been recognized that minors constitute an especially vulnerable and susceptible class requiring special protection from business practices that would not be unlawful if they only involved adults. Accordingly, a marketing practice, directed in a substantial part toward minors, that interferes substantially and unjustifiably with their freedom of buying choice is an unfair or deceptive act or practice even if it is not especially pernicious as to adults.}
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\text{32. 532 F.2d 207 (2d Cir. 1976).}
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healthy growth and development of children. To ascertain the target consumers' interpretation of this claim, the Commission surveyed the juvenile market toward which the advertisement was directed. The United States Court of Appeals for the Second Circuit affirmed the Commission's finding that the advertisements had a tendency to deceive children; the respondent falsely implied that its product contained nutrients peculiarly essential for normal growth and development.

A number of factors must be considered in determining whether an advertisement has a tendency or capacity to deceive. These factors include the advertising medium, the location and timing of the advertisement, and the intended audience for the advertisement. For example, an advertisement for sugar-coated cereal shown on Saturday morning television is likely to be seen by young, unsophisticated consumers. On the other hand, an advertisement for micro-computers placed in a business publication is more likely to reach adult, intelligent consumers. Also, certain types of products are typically marketed in a deceptive way. Consumers who read gossip magazines in search of advertisements for mail-order weight reduction remedies

33. Id. at 210-12. The court found that respondent's advertisements impliedly represented the following:
   a) Wonder Bread is an outstanding source of nutrients, distinct from other enriched breads.
   b) Consuming . . . Wonder Bread . . . provide[s] a child . . . all the nutrients essential to healthy growth and development.
   c) Parents can rely on Wonder Bread to provide their children with all nutrients that are essential to healthy growth and development.
   d) The optimum contribution a parent can make to his child's nutrition is to assure that the child consumes Wonder Bread regularly.
   e) The protein supplied by . . . Wonder Bread is complete protein of high nutritional quality necessary to assure maximum growth and development.

Id. at 212.

34. The Commission relied on the expert testimony of two psychiatrists and one pediatrician regarding the likely effect that the representations would have on the targeted juvenile audiences. Id. at 214. See also Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944) (findings of capacity to deceive based on surveys of women who were likely purchasers of respondent's skin care product); see also Ward Laboratories, Inc. v. FTC, 276 F.2d 952, 955 (2d Cir.) (finding capacity to deceive based on surveys of bald men to whom product was marketed), cert. denied, 364 U.S. 827 (1960).

35. 532 F.2d at 220.


37. See cases cited supra note 31.

38. The Commission realizes that it would be impossible to hold an advertiser liable for every possible interpretation of one of its ads. See Heinz W. Kirchner, 63 F.T.C. 1282 (1963), aff'd, 337 F.2d 751 (9th Cir. 1964). In Kirchner, the Commission commented on its responsibility to prevent the "gullible and credulous" from being deceived:

   True, as has been reiterated many times, the Commission's responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable . . . This principle loses its validity, however, if it is applied uncritically
require more protection from deception than experienced plant managers who read technical journals for advertised information on industrial equipment.\footnote{39}

An advertisement's tendency to deceive is currently understood to mean the advertisement's tendency to deceive an audience more gullible than the reasonable consumer.\footnote{40} In \textit{Aronberg v. FTC},\footnote{41} the petitioner marketed a drug called "Triple X Compound," which purportedly induced menstruation in women.\footnote{42} The court affirmed the Commission's finding of deception, stating that the FTC Act protects the "ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often

or pushed to an absurd extreme. An advertiser cannot be charged with liability in respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded . . . . Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark . . . . A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.\footnote{Id. at 1290. See also The Kroger Co., 98 F.T.C. 639, 728 (1981) (advertisers are not liable for every possible interpretation of their advertisements), \textit{modified}, 100 F.T.C. 573 (1982).}

\footnote{39. Porter v. Diersch, 605 F.2d 294, 303-04 (7th Cir. 1979).}

\footnote{40. Early in the Commission's history, the Supreme Court applied a "reasonable person standard" to its review of Commission findings. See FTC v. Algoma Lumber Co., 291 U.S. 67, 79 (1934). The Court noted that "the careless and unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to draw the standard down." \textit{Id.} The "reasonable person standard" was soon abandoned for a lower, more protective standard. Even today, the Commission states its findings in terms of whether ordinary or average consumers would be deceived by a claim. \textit{See}, e.g., Stupell Originals, Inc., 67 F.T.C. 173, 186 (1965) (ordinary purchaser would not recognize defect in goggles); Warner-Lambert Co., 86 F.T.C. 1398, 1415 n.4 (1975) (evaluating effect of Listerine ad on average consumer), \textit{aff'd as modified}, 562 F.2d 749 (D.C. Cir. 1977), \textit{cert. denied}, 435 U.S. 950 (1978).}

\footnote{41. 132 F.2d 165 (7th Cir. 1942).}

\footnote{42. The following were typical advertisements for "Triple X Compound":

Don't be alarmed over delayed, overdue, unnaturally suppressed periods. A new discovery—Triple-X Relief Compound is fastest acting, safest aid to married women. Acts without discomfort or inconvenience even in obstinate cases.

Much of the constant charm and loveliness of womanhood depends upon a regular occurrence of her periodic function. When a lapse of this vital function occurs due to such causes as a cold, nervous strain, exposure or many other abnormal reasons, her comfort is often disturbed by pain ** her disposition is apt to turn irritable. What is more, the happiness of those dear to her may be affected. \textit{Id.} at 166-67}

The Commission has not specified a minimum percentage of consumers who must be misled for a claim to be labelled deceptive. One commentator noted: "Generally, twenty or twenty-five percent may be considered a substantial number. A smaller percentage may be sufficient, however, if physical injury or large monetary loss could result from consumers being misled." Bailey & Pertschuk, \textit{supra} note 3, at 890-91. \textit{See} American Home Prods. Corp., 98 F.T.C. 136, 393-94 (deception found where 22% of viewers concluded that seller's over-the-counter drug relieved tension), \textit{aff'd as modified}, 695 F.2d 681 (3d Cir. 1982); Bristol-Myers Co., 85 F.T.C. 688, 745 (1975) (deception found where 14 to 33% of consumers understood advertisement to mean that "Dry Ban" deodorant "went on dry"); Benrus Watch Co., 64 F.T.C. 1018, 1045 (1964) (deception found where 14% of the watch buying public was mislead), \textit{aff'd}, 352 F.2d 313 (8th Cir. 1965).
are governed by appearances and general impressions.\textsuperscript{43} The United States Supreme Court, in \textit{FTC v. Standard Education Society},\textsuperscript{44} also stated that the FTC Act should be construed broadly to protect consumers from deceptive practices.\textsuperscript{45} In that case, the respondents represented falsely that they were giving away free volumes of encyclopedias as part of a broader pitch to sell complete sets.\textsuperscript{46} The Court held that "there is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious."\textsuperscript{47}

Most courts have upheld Commission findings that an advertisement had a capacity to deceive, even when the deception resulted from an absurd or unforeseen interpretation. For example, in \textit{Gelb v. FTC},\textsuperscript{48} the Second Circuit Court of Appeals sustained the Commission's finding that an advertisement that supposedly claimed that a hair coloring product was permanent had a capacity to deceive.\textsuperscript{49} Yet, only one consumer testified that the representation deceived her.\textsuperscript{50} Some courts, however, have required that an advertisement have more than a marginal tendency to deceive consumers in order to affirm a Commission action against an advertiser. In \textit{Kirchner v. FTC},\textsuperscript{51} a Ninth

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43. \textit{Id.} at 167. Petitioner's advertisements were found deceptive because they failed to disclose that the use of "Triple X Compound" could produce severe gastro-intestinal disturbances, as well as toxic and circulatory abnormalities, in women who used the drug. \textit{Id.} at 169.

44. 302 U.S. 112 (1937).

45. \textit{Id.} at 116-20.

46. \textit{Id.} at 114-15. Respondents also used fictitious testimonials and falsely represented that they were selecting certain "well connected representative people" in order to present them with a free "artcraft deluxe edition" of the encyclopedia. \textit{Id.} at 114.

47. \textit{Id.} at 116. The Court also stated that "[t]he best element of business has long since decided that honesty should govern competitive enterprises, and that the role of caveat emptor should not be relied upon to reward fraud and deception." \textit{Id.}

48. 392 F.2d 921, 926 (6th Cir. 1968) ("the Commission is bound to protect the public in general, the unsuspecting as well as the skeptical") (citing \textit{Exposition Press, Inc. v. FTC}, 295 F.2d 869 (2d Cir. 1961), \textit{cert. denied}, 370 U.S. 917 (1962)); \textit{Exposition Press, Inc. v. FTC}, 295 F.2d 869, 872 (2d Cir. 1961) ("in evaluating the tendency of language to deceive, the Commission should look not to the most sophisticated readers, but rather to the least"), \textit{cert. denied}, 370 U.S. 917 (1962).

49. 144 F.2d 580 (2d Cir. 1944).

50. \textit{Id.} at 582. In \textit{Gelb}, a "Clairol" hair coloring product was advertised as permanent although new hair grown after application of the preparation would not be colored. In addition, the company represented that its product "reconditioned the hair" and was "harmless or safe for use." \textit{Id.}

51. 337 F.2d 751 (9th Cir. 1964).
\end{footnotesize}
Circuit case from 1964, a manufacturer falsely represented that its swimming-aid device would enable a non-swimmer to swim. The Kirchner court stated that an advertisement had no tendency to deceive, under the FTC Act, when an insignificant number of consumers interpreted the advertisement unreasonably. The Kirchner court left unanswered the questions of what makes an interpretation unreasonable, and what number of consumers comprise an insignificant number.

Fourth, the Commission must determine that a representation is materially deceptive. One example of what constitutes a material deception was discussed by the Supreme Court in FTC v. Colgate-Palmolive Co. In Colgate-Palmolive, the respondent company claimed in a television advertisement that its product, a shaving cream, could soften a piece of sandpaper for shaving. A Commission hearing examiner learned that the product could soften sandpaper only after the paper had soaked in the cream for eighty

52. Id. at 752. A typical advertisement for respondent’s swimming-aid device was as follows:

SWIM EZY
(Depiction of a young lady in a bathing suit)
INVISIBLE SWIM AID
NON-SWIMMERS SWIM INSTANTLY
Yes, now you too can swim like a fish the easy, safe way * * * new, unique 4-oz. device, 1/25" thin, worn INVISIBLE under bathing suit or swim trunks, floats you at ease, without effort * * * it makes anyone unsinkable. Poor swimmers look like champions * * *money back guarantee * * *

Heinz W. Kirchner, 63 F.T.C. 1282, 1283 (1963).

53. 337 F.2d at 752-53.

54. In American Home Prod. v. FTC, 695 F.2d 681 (3d Cir. 1982), the court of appeals was unwilling to accept a Commission finding that claims for an over-the-counter pain reliever had a capacity to deceive, when only 7% of targeted consumers were projected to be deceived. Id. at 699. But see Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973) (capacity to deceive found when 15% of consumers were misled).


The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

Id. (emphasis added). Generally, an act or practice is deceptive only if it is misleading in a material way. Materiality refers to the ability of an act or practice to influence a consumer’s decision to purchase a product or service. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 387 (1965); see also American Home Pros. Corp., 98 F.T.C 136, 368 (1981) (misleading information must materially affect a consumer’s decision to purchase a product or service).


57. Id. at 376-77. The case arose from an assertion by Colgate-Palmolive that its brand of shaving cream could "out shave" all competitors. Id. at 376.
minutes; this fact was not disclosed in the commercial. In holding that the commercial misrepresented a material fact, the Court accepted the Commission's definition of a material fact as any representation that could be an important inducement or motivation for the consumer to purchase that product. The Commission is not required to find an actual consumer injury to conclude that a representation is materially deceptive. Given the Supreme Court's broad interpretation of what constitutes a material deception, courts typically defer to Commission findings in that area.

B. Commission Rulemaking Procedures

Under the FTC Act, the Commission has the authority to regulate deceptive acts or practices in commerce. Before 1962, the Commission administered its deception policy solely through case-by-case adjudication. The Commission issued complaints, conducted hearings, made findings of facts, and issued cease-and-desist orders. While this approach is still in use today

58. Id. at 376. Colgate-Palmolive simulated the sandpaper shaving test using plexiglass covered with sand because the TV camera could not detect the grainy nature of real sandpaper. Id. at 377. The hearing examiner dismissed the complaint because he believed that neither the misrepresentation concerning the actual soaking time, nor the identity of the shaved substance, was a material misrepresentation that would mislead the public. Id.

59. Id. at 376.

60. Id. at 386-87. Product demonstrations or visual displays may deceive consumers because they misrepresent the performance or capabilities of a product. Id. at 391-92. See, e.g., Standard Oil Co. v. FTC, 577 F.2d 653, 655 (9th Cir. 1978) (visual demonstration that product substantially reduced automobile exhaust emissions was misleading); ITT Continental Baking Co. v. FTC, 532 F.2d 207, 214-15 (2d Cir. 1976) (visual sequence showing child growing up in seconds misrepresented “Wonder Bread” as an extraordinary growth food for children); Libbey-Owens-Ford Glass Co. v. FTC, 352 F.2d 415, 417-18 (6th Cir. 1965) (television depiction of glass window deceptive where purported photograph through glass was taken through an open window).

61. See supra note 50 and accompanying text.

62. ITT Continental Baking Co., Inc. v. FTC, 532 F.2d 207, 218 (2d Cir. 1976) (deferring to Commission’s finding that respondent’s claims about nutritional value of its bread were materially overstated and therefore misleading).


64. 15 U.S.C. § 45 (describing power of Commission to prohibit deceptive acts or practices by adjudication).

65. 15 U.S.C. § 45(b). Section 45(b) states:

Whichever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice
against some deceptive acts, it proved to be costly and time-consuming as the sole remedy for deception.\textsuperscript{66} Moreover, the issuance of a cease-and-desist order against one company had no direct influence on similar practices throughout the industry.

In 1962, the Commission established a Rules Division to issue trade regulation rules.\textsuperscript{67} In the first trade regulation adopted by the Rules Division—limitations on cigarette advertising\textsuperscript{68}—the Commission stated in its basis and purpose\textsuperscript{69} that trade regulation rules should be adopted to prevent deceptive practices throughout an entire industry.\textsuperscript{70} Aside from its general efficiency, rulemaking is fair to all companies in an industry because the entire industry receives notice about what practices are considered to be deceptive.\textsuperscript{71}

The Commission's rulemaking practice was given statutory sanction in the Magnuson-Moss Federal Trade Commission Improvement Act of 1975 (FTCIA).\textsuperscript{72} The FTCIA created statutory rulemaking authority for the Commission in the field of consumer protection. The FTCIA also required the

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\item of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint . . . .
\item E. KINTER, A \textit{PRIMER ON THE LAW OF DECEPTIVE PRACTICES} 64 (2d ed. 1978). At that time § 6(g) of the FTC Act was the Commission's statutory authority for rulemaking. Section 6(g) states that the Commission shall have the power "to make rules and regulations for the purpose of carrying out the provisions of this Act." 15 U.S.C. § 46(g).
\item 29 Fed. Reg. 8324 (1964) (codified at 16 C.F.R. §§ 408.1-.4 (1985)).
\item Every trade regulation rule issued by the Commission must include a statement of basis and purpose (SBP). 15 U.S.C. § 57a(d)(1). The SBP must include:
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\item (A) a statement as to the prevalence of the acts or practices treated by the rule;
\item (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and
\item (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.
\end{itemize}
\item Id. at 8366-68. See also Wegman, \textit{Cigarettes and Health: A Legal Analysis}, 51 CORNELL L.Q. 678, 749-51 (1966).
\item The APA requires that administrative rulemaking conform to one of two models: formal or informal. 5 U.S.C. §§ 552, 556-57. Pursuant to formal rulemaking procedures, an agency must conduct evidentiary hearings during which interested parties are entitled to cross-examine witnesses. All hearings must be on the record and must use formal rulemaking procedures. In
\end{itemize}
Commission to follow certain procedures in addition to those required for informal rulemaking under the Administrative Procedure Act.\textsuperscript{73}

Under the "hybrid procedures"\textsuperscript{74} of the FTCIA, the Commission begins the rulemaking process by publishing initial notice of the proposed rule.\textsuperscript{75} The Commission then designates a presiding officer to set an agenda for the rulemaking proceedings.\textsuperscript{76} After final notice of the proposed rule is published in the Federal Register,\textsuperscript{77} the presiding officer conducts oral hearings, which include the opportunity for interested parties to cross-examine witnesses in addition, a statement of basis and purpose must accompany every published rule. \textit{See supra} note 69. Informal rulemaking requires that an agency publish notice in the Federal Register, solicit comments from interested parties, and publish a final decision. 5 U.S.C. § 553.

73. Rulemaking procedures that combine special agency requirements with APA requirements are termed "hybrid." 5 U.S.C. § 553.


75. 15 U.S.C. § 57a(b) (1982) states:

(b) \textit{Procedures applicable}

(1) When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall proceed in accordance with section 553 of Title 5, [5 U.S.C. § 553] (without regard to any reference in such section to sections 556 and 557 of such title [5 U.S.C. §§ 556 and 557]), and shall also (A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with subsection (c) of this section; and (D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B) of this section), together with a statement of basis and purpose.

(2)(A) Prior to the publication of any notice of proposed rulemaking pursuant to paragraph (1)(A), the Commission shall publish an advance notice of proposed rulemaking in the Federal Register. Such advance notice shall—

(i) contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and

(ii) invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

(B) The Commission shall submit such advance notice of proposed rulemaking to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives. The Commission may use such additional mechanisms as the Commission considers useful to obtain suggestions regarding the content of the area of inquiry before the publication of a general notice of proposed rulemaking under paragraph (1)(A).

(C) The Committee shall, 30 days before the publication of a notice of proposed rulemaking pursuant to paragraph (1)(A), submit such notice to the Commission on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives.

76. 16 C.F.R. § 1.11(a)(4) (1985).

about the proposed rule. Following the hearings, Commission staff members place recommendations in the rulemaking record, and the presiding officer makes a recommendation about the proposed rule based upon the findings and conclusions on the record. All recommendations are made public and interested parties have an opportunity to comment on them for the record. Finally, the entire rulemaking record is submitted to the Commission for its judgment. If the Commission promulgates a final rule, it is published in the Federal Register, accompanied by a statement of basis and purpose.

II. The Commission’s 1983 Deception Enforcement Policy

On October 14, 1983, the Commission adopted its Policy for enforcement of the FTC Act injunction against deceptive acts or practices. Three Com-
missioners voted in favor of the Policy, and two voted against. The Policy was adopted by the Commissioners without public hearings. Nevertheless, the new Policy portended major changes in the enforcement of its deception policy.

Chairman Miller expressed the majority view in a letter to the Chairman of the House Committee on Energy and Commerce, Representative John Dingell. The Policy states that deception will be found where “[t]here is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances to the consumer’s detriment.” This Policy contains what Chairman Miller characterizes as a clear and understandable standard of deception as derived from prior case law. The purpose of this purported restatement was to provide guidance and certainty to businesses and consumers.

Commissioners Pertschuk and Bailey wrote strong dissents in opposition to the Policy. The dissenters doubted the accuracy of Chairman Miller’s restatement of the definition of deception. Although the purported restatement is semantically similar to the prior case law definition, the dissenters argued that the Policy is actually a substantial departure from well-established precedent on deception. The dissenters argued that the Policy improperly combines apparently correct legal principles with Chairman Miller’s personal views on the law of deception. The dissenters concluded that the true purpose of the Policy is to narrow the Commission’s policing power over

stances to their detriment or that the misrepresentor knew or should have known would be misleading.” Id. at 6. Chairman Miller referred to this proposal as “the same definition I recommended last year.” Id. The proposal emphasized that “there should be evidence that consumers are indeed injured” before a practice is alleged to be deceptive. Id. at 16; see also id. at 84 (statement of Douglas, Comm’r) (FTC Act should require Commission “to find economic injury to consumers before proceeding”). The proposal also repeated Chairman Miller’s request for a “reasonable consumer” standard of deception. Id. at 16.

85. The majority comprised Chairman Miller, Commissioner Douglas, and outgoing Commissioner Clanton. Strong dissents were filed by Commissioners Bailey and Pertschuk. Policy, supra note 3, at 56,071-79 (Bailey and Pertschuk, Comm’rs, dissenting).

86. Policy, supra note 3.
87. Id. at 56,072.
88. Id. at 56,071.
89. Id. at 56,085-86 (Douglas, Comm’r, concurring).
90. Id. at 56,079-84 (Pertschuk and Bailey, Comm’rs, dissenting).
91. See Sears, Roebuck & Co. v. FTC, 258 F. 307, 311 (7th Cir. 1919) (test of deception is whether an act or practice has the “tendency or capacity” to mislead a substantial number of consumers in a material way). See Bailey & Pertschuk, supra note 3, at 850.
92. Policy, supra note 3, at 56,079-80 (Bailey, Comm’r, dissenting). Commissioner Pertschuk speculated: “There is, of course, more than a little inconsistency in failing to persuade Congress that the law of deception should be changed, then concluding that the law was already the way the Chairman wanted it to be.” Id. at 56,083 (Pertschuk, Comm’r, dissenting). Generally, Commissioner Pertschuk stated that the Policy is “internally inconsistent, confusing, and slipshod in use of legal precedent.” Id.
93. Id. at 56,084.
deceptive advertising practices and thereby diminish consumer protection against unethical and fraudulent advertising practices.94

Chairman Miller's Policy adopts a formal, three-point definition of deception. A deceptive claim must be likely to deceive consumers, must deceive reasonably prudent consumers, and must be a material misrepresentation of fact. Notwithstanding the dissenters's belief that the Policy is unsupported by case law,95 each separate element is substantiated by some precedent. Yet, the majority's interpretation of the cases is strained, and the effect of the Policy is to inhibit government intervention into the marketplace.96

A. The " Likely to Deceive" Standard and Additional Evidentiary Burdens

The Policy states that in any deception case the Commission must find "a representation, omission, or practice that is likely to mislead the consumer."97 The Policy's requirement that an advertisement be "likely to deceive" consumers is a blatant departure from the previously established "tendency or capacity to deceive" standard.98 Remarkably, Chairman Miller cites the single case of Beneficial Corp. v. FTC99 in support of the "likely to mislead" standard. In Beneficial Corp., a finance company advertised a consumer loan as "an instant tax refund."100 The Commission determined that the quoted representation had the tendency to lead consumers to believe falsely that the availability of the loan was based on income tax refund entitlement, rather than on traditional credit worthiness.101 The Court of Appeals for the Third Circuit affirmed the Commission's decision.

Chairman Miller's interpretation of the Beneficial Corp. case, as applying a "likely to deceive" standard, is of doubtful validity. First, the opinion contains numerous references to the obligation of the Commission to find a mere tendency to deceive in a representation, rather than an actual deception.102 Chairman Miller, in his Policy statement, overlooked these references and relied upon a single sentence in the opinion that used the phrase

94. Id.
95. Id.
96. See, e.g., Policy, supra note 3, at 56,082-84 (Pertschuk, Comm'r, dissenting).
97. Id. at 56,071. The Policy states that the first relevant inquiry is whether the consumer is "likely" to be deceived, rather than whether actual deception occurs. Id. at 56,072-73. Chairman Miller relied on Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976) ("the likelihood or propensity of deception is the criterion by which advertising is measured"), cert. denied, 430 U.S. 983 (1977), for the proposition that representations need only be likely, rather than certain, to deceive consumers.
98. See supra notes 27-54 and accompanying text.
100. Id. at 614.
101. Id. at 617.
102. Id. at 617-18. That the Commission is obligated to find a mere tendency to deceive, rather than actual deception, is referred to three times on page 617 of the opinion, and once on page 618.
“likelihood or propensity” to deceive, rather than “tendency or capacity to deceive.”  If the opinion is read as a whole, in light of the court's numerous references to the word “tendency,” it is apparent that the court used the phrase “likelihood or propensity” in one instance simply to provide stylistic variety in the opinion, rather than to suggest a substantive change in the law of deception.

Second, the court in Beneficial Corp. emphasized that a showing of actual deception was not required to prove a deception claim. The court apparently never intended for the term “likelihood or propensity” to mean anything different than “tendency or capacity.” On the contrary, all of the cases cited in support of the “likelihood or propensity” language actually applied a “tendency or capacity” standard. For this reason, the court’s single use of the phrase “likelihood or propensity” should not be read as a substantive change in the deception standard.

The controversy over the majority's switch from a “tendency” to a “likelihood” of deception standard centers on the question of whether the Commission intended to create a higher standard of proof for deception. The word “likely” denotes an “imminent” event, while the word “tendency” suggests a mere “inclination.” Although the Policy does not explicitly call for a high probability of deception, Chairman Miller has twice requested Congress to produce a statutory definition of deception that incorporates a high probability standard. Presumably, Chairman Miller's substitution of the word “tendency” with the word “likely” is a deliberate attempt to raise the standard of probability of deception.

A higher standard for deception may also be inferred from the Policy's occasional reference to a supposed prima facie requirement of extrinsic evidence of deception. Chairman Miller asserts that extrinsic evidence may

103. Id. at 617.
104. See Bailey & Pertschuk, supra note 3, at 856 n.41.
105. 542 F.2d at 617.
106. See Bailey & Pertschuk, supra note 3, at 856 n.41.
107. The four cases on which the Beneficial court relied did not apply a single, “likely to deceive” standard. See Resort Car Rental Sys., Inc. v. FTC, 518 F.2d 962, 964 (9th Cir.) (Commission “has the expertise to determine whether advertisements have the capacity to deceive or mislead the public”), cert. denied, 423 U.S. 827 (1975); Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (7th Cir. 1967) (“the likelihood of deception or the capacity to deceive is the criterion by which the advertising is judged”); Bankers Sec. Corp. v. FTC, 297 F.2d 403, 404-05 (3d Cir. 1961) (court applied neither “likelihood” nor “tendency or capacity” standard in affirming Commission's finding of deception); Feil v. FTC, 285 F.2d 879, 897 (9th Cir. 1960) (Commission's use of the “tendency or capacity to deceive” standard was not challenged by court upon review).
109. See supra note 92.
110. Policy, supra note 3, at 56,073. Chairman Miller stated that when the Commission considers the meaning of implied representations, in some situations “the Commission will require extrinsic evidence that reasonable consumers reach the implied claims . . . . [T]he Commission will carefully consider any extrinsic evidence that is introduced.” Id. at 56,072-73 (emphasis added).
be required to determine consumer perception from misrepresentations or omissions. In support of this assertion, Chairman Miller cited a footnote found in *Leonard F. Porter, Inc.*, a Commission adjudication from 1976. In *Porter*, the respondent was ordered to cease distribution of its products, which, by virtue of their appearance and design, appeared to be handcrafted by native Alaskan Indians. The products were actually manufactured by non-native, non-Alaskan Indians in the state of Washington. Because there was no evidence that consumers would assume that the products were made by native Americans, the *Porter* Commission found no deception in the merchant's failure to disclose the true origin of the products.

To support his proposition that extrinsic evidence is required in some instances to determine consumer expectations, Miller cited the following footnote from the *Porter* decision:

> By requiring such evidence, we do not imply that elaborate proof of consumer beliefs or behavior is necessary, even in a case such as this, to establish the requisite capacity to deceive. However, where visual inspection is inadequate, some extrinsic testimonial evidence must be added.

Chairman Miller's reliance on this single footnote in *Porter* misconstrued the legal precedent. Chairman Miller failed to include, along with the footnote, the language from the opinion to which the footnote was appended:

> While it is certainly within the authority and expertise of the Commission to make such a determination [of deception], the judgment involved is one which cannot with prudence be made without some resort to record evidence respecting the assumptions, attitudes, and behavior of consumers in Alaskan gift shops.

At first glance, the text and footnote appear inconsistent. However, if the text and footnote are read in the context of the whole opinion, it is apparent that the *Porter* Commission intended to say that findings supported by extrinsic evidence were helpful but not essential. The *Porter* Commission also believed that, even without extrinsic evidence, it had the authority and expertise to decide whether an advertisement had a tendency to deceive. In unusual cases such as *Porter*, therefore, proper judicial prudence calls for

111. Id.
112. Id. (citing Leonard F. Porter, Inc., 88 F.T.C. 546, 626 n.5 (1976)).
114. Id.
115. See also Elliot Knitwear, Inc. v. FTC, 266 F.2d 787, 789 (2d Cir. 1959) (term "Cashmora" on sweater labels not "deceptive per se" when labels also disclosed sweater content); The Kroger Co., 98 F.T.C. 639, 728-30 (1981) (summary judgment improper where factual issue remains concerning message of advertisement), modified, 100 F.T.C. 573 (1982).
116. See supra note 112.
117. Policy, supra note 3, at 56,073 n.13 (quoting Leonard F. Porter, Inc., 88 F.T.C. 546, 626 n.5 (1976)).
119. See supra text accompanying note 118. See also supra notes 19-21 (Commission may base finding of deception solely on own authority).
a showing of extrinsic evidence; in no event, however, is such a showing of extrinsic evidence required by the FTC Act. Referring to the Porter footnote without citing the text,\textsuperscript{120} as Chairman Miller did in the majority statement,\textsuperscript{121} misrepresents the opinion.\textsuperscript{122}

In sum, the Commission's requirement that an advertisement be likely to deceive makes the Policy ambiguous.\textsuperscript{123} If Chairman Miller intended for the word "likelihood" to have any meaning different from the traditional language of "tendency or capacity" to deceive, then the Policy is supported only by the most circuitous reading of prior case law. If Chairman Miller intended "tendency" and "likelihood" to have the same meaning, on the other hand, then there was no need to deviate from the established language.\textsuperscript{124} Such ambiguity in the first element of the reformulated definition of deception does not comport with the professed purpose of the Policy—to provide certainty and guidance to businesses and consumers.\textsuperscript{125}

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\textsuperscript{120} See supra text accompanying note 117.
\textsuperscript{121} Policy, supra note 3, at 56,072-73.
\textsuperscript{122} Even taken in the most innocent light, the majority's reliance upon a single footnote to support its broad proposition that extrinsic evidence is required to prove deception is, at best, tenuous. On the other hand, Commissioner Pertschuk's assertion that the Commission now requires extrinsic evidence in all cases, Policy, supra note 3, at 56,084 (Pertschuk, Comm'r, dissenting), is also unsupported by the Porter opinion. The Porter Commission stated that the need for extrinsic evidence varies from case to case:

An advertisement for shaving cream is likely to convey fairly much the same meaning to the Commission viewing it in chambers as it is to consumers seeing it in their living rooms. Similarly, the deceptive potential of a box filled half with toys and half with air is no less apparent when perched on our meeting table than when nestled on the retailer's shelf. The evidence in this case is somewhat different. We have looked at the seals, walruses, Eskimos, story bracelets, totem poles, creches, mukluks, billikens and other artifacts placed in the record by complaint counsel. Simply from viewing these items, without further information, we would not conclude that they possess the capacity to deceive as to their origin and method of manufacture. We are asked to determine, however, whether they would have such capacity when viewed by consumers in Alaska. While it is certainly within the authority and expertise of the Commission to make such a determination, the judgment involved is one which cannot with prudence be made without some resort to record evidence respecting the assumptions, attitudes, and behavior of consumers in Alaskan gift shops.


In a footnote to its opinion, the Porter Commission stated that "[b]y requiring such evidence, we do not imply that elaborate proof of consumer beliefs or behavior is necessary, even in a case such as this, to establish the requisite capacity to deceive. However, where visual inspection is inadequate, some extrinsic testimonial evidence must be added." \textit{Id.} at 626 n.5.

\textsuperscript{123} Policy, supra note 3, at 56,080-81 (Bailey, Comm'r, dissenting).

\textsuperscript{124} Commissioner Bailey commented that:

[O]ne is left to wonder whether these two perhaps similar ideas are indeed the same, and if so why the traditional "tendency or capacity" phrasing was not used. On the other hand if the "likelihood" standard is intended to describe a different standard, is it a higher or a lower standard?

\textit{Id.} at 56,080.

\textsuperscript{125} \textit{Id.} at 56,071, 56,079.
B. "Reasonable Person" Standard

The Policy states "that to be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances" of the representation. In a footnote to this statement, the majority of the Commission supposedly elaborated on its standard of a reasonable consumer: "An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive." Surprisingly, the standards of reasonableness suggested respectively by the text and the footnote do not correspond. The text of the Policy implies that a consumer's interpretation of a representation must be objectively reasonable in order for the representation to be colorably deceptive. The footnote, in contrast, suggests that an interpretation of an advertised claim may be reasonable even if the interpretation is shared by only an ignorant and credulous few. Again, the distinctions are subtle, but one would expect the majority to state a new "reasonable person" standard unambiguously, in order to further the Policy's purpose of guidance and certainty.

The Policy also ambiguously refers to the Kirchner case in support of its discussion of the "reasonable consumer" standard. The majority cited Kirchner to justify the use of the word "reasonable" to qualify the type of consumer that deserves protection. Again, Chairman Miller's use of the case law is strained. The majority asserted that "to be considered reasonable, the [consumer's] interpretation or reaction does not have to be the only one." The footnote that supports this statement implies that a claim may be found to be deceptive if it has more than one meaning, even if one

126. Id. at 56,074.
127. Id. at 56,074 n.20 (citing Heinz W. Kirchner, 63 F.T.C. 1282 (1963), aff'd, 337 F.2d 751 (9th Cir. 1964)).
128. Id. at 56,074.
129. 63 F.T.C. 1282 (1963), aff'd, 337 F.2d 751 (9th Cir. 1964). For a discussion of the Kirchner decision, see supra notes 51-53 and accompanying text.
130. Policy, supra note 3, at 56,074 & n.20.
131. According to the dissenters from the Policy, there is no authority for the majority's assertion that an act or practice must be considered from the perspective of a "reasonable consumer":
   There is no authority for the new standard's proposition that the Commission may not find a violation of section 5 unless consumers were acting reasonably. Existing case law almost universally focuses on the reasonableness of the Commission's interpretation of an act or practice. Although some cases have described how consumers could reasonably have interpreted an advertisement as making a misleading claim, these cases have done so only to illustrate the deceptive nature of the claim and not to suggest that such a showing is necessary to a finding of deception.
Bailey & Pertschuk, supra note 3, at 857 (emphasis in original).
132. Policy, supra note 3, at 56,074.
133. Id. at 56,074 n.21.
Nevertheless, the majority relied on this language to support the proposition that consumers must be "reasonable" in their interpretations of advertised claims. Presumably, the Kirchner court intended to say that all alternative interpretations of ambiguous representation must be reasonable. The Commission majority used ambiguous language from Kirchner to create a higher standard of proof for deception. To further buttress the "reasonable consumer" standard, the majority proposed that companies charged with deception need not be liable for every possible interpretation of claims by consumers. To support this argument, the majority quoted a statement of law from the Kirchner decision:

An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it therefore an actionable deception to advertise "Danish pastry" when it is made in this country? Of course not. A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.

If the majority quoted this language to support the proposition that a company will not be liable for every unreasonable interpretation by advertised claims, then the Policy restates the obvious. It is more probable that the

134. The supporting footnote to this textual proposition stated that "[a] secondary message understood by consumers is actionable if deceptive even though the primary message is accurate." Id. (citing Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 387 (7th Cir. 1953), aff'd, 348 U.S. 940 (1955); Sears, Roebuck & Co., 95 F.T.C. 406, 511 (1980), aff'd, 676 F.2d 385 (9th Cir. 1982); Chrysler Corp., 87 F.T.C. 749, aff'd, 561 F.2d 357 (D.C. Cir. 1976), reissued, 90 F.T.C. 606 (1977)).

135. Commissioner Bailey commented on the "reasonableness" requirement that under the new standard the Commission would be able to find deception only in cases in which consumers have acted reasonably:

I have asked before and must ask again: is it "reasonable" to buy undeveloped land sight unseen? Is it "reasonable" for a consumer to permit him or herself to be baited and switched to a more expensive product than he or she went into a store to buy? Is it "reasonable" to rely on oral representations in transactions involving large sums of money when written contracts deny or disclaim any oral misrepresentations? Different minds might reach different answers to these questions. Yet the Commission has traditionally chosen to protect consumers in these circumstances . . . I foresee a great harm to the public interest if this standard prevents the Commission from continuing important work that has in the past resulted in numerous lawsuits on behalf of literally thousands of injured consumers and substantial monetary redress.

Policy, supra note 3, at 56,081.

136. Id. at 56,074.

137. Heinz W. Kirchner, 63 F.T.C. 1282 (1963), aff'd, 337 F.2d 751 (9th Cir. 1964).

138. Policy, supra note 3, at 56,074 (quoting Kirchner, 63 F.T.C. at 1290). For a discussion of the Kirchner decision, see supra notes 51-53 and accompanying text.

139. Commissioner Pertschuk conceded in his dissent that the Commission should not take
majority used this language to lay a foundation for further contractions of the Commission's enforcement role; the Policy moves the Commission's deception policy closer to a "reasonable consumer" standard. Since the Policy implies that some interpretations are not actionable, the Commission is set to impose a requirement that only the "reasonable consumer's" interpretation of a claim may be considered in deception cases. Under such a standard, consumers would be unprotected by the Commission if they were injured as a result of their less than reasonable reliance upon misrepresentations.4

A more correct interpretation of Kirchner can be drawn directly from the opinion's language: "[A]s has been reiterated many times, the Commission's responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable."141 This statement is in contrast to Chairman Miller's interpretation of Kirchner. Apparently, the Kirchner Commission recognized the traditional principle that the Commission should protect credulous consumers as well as reasonable ones. When the Kirchner Commission spoke of the need to protect the "gullible and credulous," it doubtlessly referred to the Commission's duty to protect a vulnerable segment of the consuming public.142

The Policy's "reasonable consumer" standard has some apparent support in the case law. A substantial number of recent cases appear to use a "reasonable consumer" standard.143 The standard reflected in these recent cases may reflect the Commission's belief that its resources are too limited to expend on marginal deception cases. None of the cases, however, expressly

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140. Commissioner Pertschuk criticized the majority's new "reasonable consumer" requirement:

The legitimate concern of advertisers, that the Commission will insist on interpretations of claims that are unrealistic, is addressed by our willingness to consider extrinsic evidence of consumers' understanding when there is a genuine factual dispute. But there is a marginal segment of American commercial life—promoters of instant weight loss, bust creams, and baldness remedies; purveyors of quick fortunes in land speculation and pyramid schemes; seller of miracle cancer cures—which exist only because there are unsophisticated consumers. To introduce into the law the idea that the trusting don't deserve protection is "deregulation" in its most reckless and pointless form.

Policy, supra note 3, at 56,083-84 (Pertschuk, Comm'r, dissenting).

141. Kirchner, 63 F.T.C. at 1290.

142. Policy, supra note 3, at 56,075.

143. For example, the Policy cites the following cases in support of its "reasonableness" standard: Bristol-Myers Co., 102 F.T.C. 21, 320 (1983) ("ads must be judged by the impression they make on reasonable members of the public"); aff'd, 738 F.2d 554 (2d Cir. 1984); Sterlifig Drug, Inc., 3 TRADE REG. REP. (CCH) 22,124, at 22,910, 22914 (FTC July 5, 1983) ("consumers could reasonably interpret the ads"); American Home Prod., 98 F.T.C. 136, 372 (1981) ("record shows that consumers could reasonably have understood this language"), modified, 695 F.2d 681 (3d Cir. 1982).
overturned the prior case law,\textsuperscript{144} which extended Commission protection to less than reasonable consumers. Chairman Miller's reliance on these cases would be more persuasive if the courts had actually invoked a "reasonable consumer" standard in place of the earlier, lower standard. Yet, none of the recent cases actually urge this policy. Therefore, the Commission's reliance on these cases\textsuperscript{145} signals the majority's intent to use ambiguous language to limit their authority to regulate deception.\textsuperscript{146}

\textit{C. Materiality/Injury Requirement}

The third step in the Policy's deception analysis is the determination of whether the deceptive representation is material in fact.\textsuperscript{147} A representation, to be deceptive, must be of a sort that would influence a consumer's decision to purchase a product.\textsuperscript{148} Standing alone, this third element is not a departure from established case law.\textsuperscript{149} Chairman Miller's Policy, however, goes further and equates materiality with actual injury.\textsuperscript{150} The Policy states that when consumers make purchases that are based on deceptive representations, they detrimentally rely on those claims.\textsuperscript{151} The term "detriment," as construed by the Commission majority, presumes that a consumer has been injured by the deception.\textsuperscript{152} The Policy states that "a finding of materiality is also a finding that injury is likely to exist . . . . Injury exists if the consumer would have chosen differently but for the deception."\textsuperscript{153}

\textsuperscript{144} See, e.g., FTC v. Standard Educ. Soc., 302 U.S. 112, 116 (1937) ("no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious."); Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942) ("law is not made for experts but to protect the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions"); Kirchner, 63 F.T.C. at 1290 ("Commission's responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable"). See also Bailey & Pertschuk, supra note 3, at 857 & n.45 (citing cases in which § 5 violations were found against advertisements that deceived reasonable consumers); supra note 40 (Commission's rejection of reasonable person standard).

\textsuperscript{145} See cases cited supra note 144.

\textsuperscript{146} See supra note 140. An alternative justification for the increased use of the "reasonable consumer" standard in these decisions is the possible innocuous use of "reasonable" as a modifier. It is doubtful that the proffered "reasonableness" standard had any effect on the outcome of these cases, since none of them addressed whether alternative interpretations must be "reasonable" to be actionable.

\textsuperscript{147} Policy, supra note 3, at 56,077-78. A claim is "material" if it affects a consumer's decision in determining whether to purchase a product. Cigarette Advertising and Labeling Rule, 29 Fed. Reg. 8325, 8386-87 (1964) (codified at 16 C.F.R. §§ 408.1-.4 (1985)) (statement of basis and purpose) ("Is [the representation] likely to affect the average consumer in deciding whether to purchase the advertised product—is there a material deception, in other words?").

\textsuperscript{148} Policy, supra note 3, at 56,077-78.

\textsuperscript{149} See supra notes 55-62 and accompanying text.

\textsuperscript{150} Policy, supra note 3, at 56,078-79.

\textsuperscript{151} Id.

\textsuperscript{152} Id.

\textsuperscript{153} Id. at 56,079.
The Commission's dissenters\textsuperscript{154} examined the majority's language on this point and argued that the Policy imposed an "actual injury" requirement on deception claims.\textsuperscript{155} In the Policy statement, Chairman Miller also briefly addressed the issue of an actual injury requirement:

A finding [of] materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice or marketing technique . . . . Injury exists if consumers would have chosen differently but for the [deception]. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept.\textsuperscript{156}

This statement treats an "injury" as one factor in a finding of materiality, rather than as a separate element of deception that requires an independent finding of actual injury. Nevertheless, this passage is susceptible to the dissenters's construction that a showing of some actual injury is required, especially in view of Chairman Miller’s past lobbying efforts before Congress for an actual injury requirement.\textsuperscript{157}

Chairman Miller’s position on the actual injury requirement is vague at best.\textsuperscript{158} The language of the Policy on this issue might have been intended to clarify the materiality requirement. Yet, the language might also have been a ruse, as the dissenters claim, to make deception claims more difficult to prove.\textsuperscript{159} It is possible that, as a Reagan appointee,\textsuperscript{160} Chairman Miller’s views on the Commission’s role in deception cases merely reflect the President’s general philosophy on the limited role of government in regulating commerce.\textsuperscript{161}

The Commission majority asserted that, "where the Commission cannot find materiality . . . the Commission may require evidence that the claim or

\textsuperscript{154} Commissioners Bailey and Pertschuk dissented from the Policy. Id. at 56,079-84 (Bailey and Pertschuk, Comm’rs, dissenting).

\textsuperscript{155} Commissioner Pertschuk asserted that the majority required a ""substantial"" showing of injury, id. at 56,084 (Pertschuk, Comm'r, dissenting), but neither the word ""substantial"" nor synonyms appear in the majority's text. Pertschuk instead appears to have been criticizing Miller's proposed statutory definition of deception and its accompanying testimony rather than the Policy as stated. Commissioner Pertschuk asserted that the statutory proposal will: ""1) make legal limited injury, 2) hamstring the Commission in preventing injury that had not yet occurred, and 3) introduce complex evidentiary problems in stopping even clearly misleading advertisements."" Id. at 56,084 (emphasis in original). See also id. at 56,081-82 (Commissioner Bailey, dissenting) (""the statement equates materiality and injury, suggesting that actual injury must be shown before a finding of materiality is made").

\textsuperscript{156} Id. at 56,079.

\textsuperscript{157} See supra note 84.

\textsuperscript{158} See supra note 147.

\textsuperscript{159} Commissioner Pertschuk stated that ""[t]he overriding problem, however, is that the drafters [of the majority statement] wanted to push the law in a new direction, one that would make it harder for the commission to act and loosen the reins on dishonesty and unscrupulous behavior."" Policy, supra note 3, at 56,084 (Pertschuk, Comm'r, dissenting).

\textsuperscript{160} See supra note 2.

\textsuperscript{161} Policy, supra note 3, at 56,084 (Pertschuk, Comm'r, dissenting) (""To introduce into the law the idea that the trusting don't deserve protection is 'degregulation' in its most reckless form"").
omission is likely to be considered important by consumers. This statement places a novel and burdensome requirement upon the Commission. In cases where the deception is not patent, the Commission may have to gather testimony from people who assert that they were deceived by claims that were likely to influence only ignorant or credulous consumers. The majority, however, did not cite any authority for this requirement. The majority also stated that a deception is material if consumers would have chosen differently "but for" the misleading act or practice. This proposition is contrary to the established rule that any representation or omission that affects a consumer's purchase decision is material. The new rule suggests that actual reliance and causation are elements of materiality.

Commissioner Pertschuk, writing in dissent, perceived three likely consequences of the majority's Policy. First, the Policy will change the law of deception by creating a "legal limited injury" requirement. Determining what Commissioner Pertschuk meant by "legal limited injury" is problematic. It is possible that such a requirement calls for a fictional finding of injury in each case of deception. Moreover, enforcement of the requirement could degenerate into a battle among the Commissioners to loosen or tighten the evidentiary standard for determining injury. Second, Commissioner Pertschuk argued that an actual injury requirement would cause the Commission to turn away from the long-standing policy of preventing deception by taking precautionary action against advertisers. Finally, Commissioner Pertschuk believes that the Policy will unduly hinder the Commission's enforcement efforts against deception. As a practical matter, it would be difficult to get consumers to testify that they were duped and injured by representations that the respondent claims could be misinterpreted only by the ignorant and credulous.

III. IMPACT OF THE NEW DECEPTION ENFORCEMENT POLICY

The Policy has driven the Commission's membership in two directions. First, for the Commission majority, the Policy has served as a basis for

162. Id. at 56,078.
163. Policy, supra note 3, at 56,078.
164. Id. at 56,079 ("Injury exists if consumers would have chosen differently but for the [d]eception") (emphasis added).
165. See supra notes 55-62 and accompanying text.
166. A standard for materiality that would require a showing that a consumer purchased a product because of the deceptive representation necessarily invokes a showing of causation or reliance thereon.
167. Policy, supra note 3, at 56,084 (Pertschuk, Comm't, dissenting).
168. Id.
169. This possibility is suggested most vividly in Commissioner Pertschuk's dissent against the Policy. See supra notes 159, 161.
170. See supra note 30 and accompanying text.
171. See supra note 164.
172. Much deception occurs because consumers are unreasonable in their expectations. See supra note 140 (Commissioner Pertschuk discussing the value of a less-than-reasonable consumer standard).
substantial alterations in the law of deception. Particularly, the "likely to deceive" standard has watered down the enforcement of deception. The Commission minority, on the other hand, has refused to accept the legitimacy of the Policy. The minority doubts the Commission's authority to issue the Policy. The Commission majority's decision to adopt the new definition without hearings did not allow public scrutiny and thereby fueled doubts about the genuineness of the Commission's objectives.1

The dissension in the Commission was highlighted in its fractured decision in Cliffdale Association,7 which was the first of four Commission cases decided under the Policy. In Cliffdale Association, an Administrative Law Judge (ALJ) ordered the respondent to "cease and desist" from making deceptive representations concerning a gas saving automotive accessory.7 The majority affirmed the decision, but disapproved of the ALJ's use of the pre-Policy legal standard of deception.7 Chairman Miller characterized the use of the old standard as "circular and therefore inadequate."77 The Commission majority used the Cliffdale Association case as an opportunity to affirm the authority of the new Policy:

Consistent with its Policy Statement on Deception, issued on October 14, 1983, the Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.17

173. Chairman Miller claimed that the Policy was a simple restatement of the law of deception:

We have therefore reviewed the decided cases to synthesize the most important principles of general applicability. We have attempted to provide a concrete indication of the manner in which the Commission will enforce its deception mandate. In so doing, we intend to address the concerns that have been raised about the meaning of deception, and thereby attempt to provide a greater sense of certainty as to how the concept will be applied.

Policy, supra note 3, at 56,071.

174. 3 TRADE REG. REP. (CCH) 22,137, at 22,947-64 (FTC Mar. 23, 1984).

175. Id. at 22,954. The respondent marketed a gasoline saving device known as the "Ball-Matic Gas Save Valve." Id. at 22,948. The company's representations were alleged to be deceptive about the device's value and performance. Id. These allegations against the company broke down into four general areas:

1) claims relating to the performance of the "Ball-Matic Gas Save Valve,"

2) claims that competent scientific tests supported respondent's claims,

3) the use of consumer endorsements, and

4) respondent lacked a reasonable basis for making the performance claims.

Id. at 22,948-49.

176. Id. at 22,949-50. The ALJ stated that "any advertising that has the tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice which violates the Federal Trade Commission Act." Id. at 22,949.

177. Id. at 22,949. The majority in Cliffdale Assoc. rejected the ALJ's use of the traditional legal standard of deception. The majority stated:

We find this approach to deception and violations of Section 5 [15 U.S.C. § 45 (1982)] to be circular and therefore inadequate to provide guidance on how a deception claim should be analyzed. Accordingly, we believe it appropriate for the Commission to articulate a clear and understandable standard for deception.

Id.

178. In addition, the majority stated: "These elements articulated the factors actually used
Commissioners Bailey and Pertschuk filed vigorous dissents. They not only challeged the legality of the Policy directly, but they also strongly rejected the Policy definition of deception as a mandatory standard. They also stated that the Policy's reformulation of the law was confusing and unwarranted.

*Thompson Medical Co.* was the second Commission opinion issued under the Policy. In *Thompson Medical*, a pharmaceutical manufacturer marketed its topical cream rub, "Aspercreme," as an effective drug for the relief of
minor arthritis symptoms.\textsuperscript{184} The respondent appealed from the ALJ’s finding of deception.\textsuperscript{185} Commissioner Douglas’s majority opinion applied the standard of deception delineated in the Policy and affirmed the ALJ’s finding.\textsuperscript{186} Commissioner Douglas examined “whether or not [respondent’s] claims were likely to mislead consumers acting reasonably under the circumstances.”\textsuperscript{187} In a brief notation, Commissioner Bailey concurred that the respondent’s practices were deceptive,\textsuperscript{188} but distanced herself from the Policy’s definition of deception.\textsuperscript{189}

In \textit{International Harvester Co.},\textsuperscript{190} a manufacturer of farm equipment sold tractors whose engines tended to geyser.\textsuperscript{191} Harvester admitted that it knew about the problem when the tractors were sold.\textsuperscript{192} The issue before the ALJ

\textsuperscript{184} Id. at 23,142. The complaint filed against the Thompson Medical Company included the following alleged deceptive representations:

- Aspercreme contains aspirin.
- Aspercreme is a recently discovered or developed drug product.
- Valid studies have scientifically proven that Aspercreme is more effective than orally-ingested aspirin for the relief of arthritis, rheumatic conditions, and their symptoms.
- Aspercreme is an effective drug for the relief of minor arthritis and its symptoms.
- Aspercreme is as effective a drug as orally-ingested aspirin for the relief of minor arthritis and its symptoms.
- Aspercreme is a more effective drug than orally-ingested aspirin for the relief of minor arthritis and its symptoms.
- Aspercreme is an effective drug for the relief of rheumatic conditions and their symptoms.
- Aspercreme acts by directly penetrating through the skin to the site of the arthritic disorder.
- The use of Aspercreme will result in no side effects.

\textit{Id.} at 23,142.

\textsuperscript{185} Id. The ALJ found against Thompson on all charges except those that related to claims that Aspercreme had no side effects. The ALJ’s order required Thompson to have a reasonable basis for claims that its product was effective for the relief of symptoms of musculoskeletal disorders. His order further prohibited Thompson from “(1) using the brand name 'Aspercreme' unless it is accompanied by a disclosure that the product does not contain aspirin; (2) representing that a product is new if it has been generally available for purchase in the United States for more than one year; and (3) misrepresenting any test or study.” \textit{Id.}

\textsuperscript{186} Id. at 23,142-43.

\textsuperscript{187} Id.

\textsuperscript{188} Id. at 23,143 n.4.

\textsuperscript{189} Id. No formal dissent was filed in the \textit{Thompson} opinion. The only indication of dissension was mentioned by the majority in a footnote. \textit{Id.} at 23,143 n.4.


\textsuperscript{191} Id. at 23,174-77. Fuel geysering is the forceful ejection of hot fuel through a loosened gas cap. The complaint filed against International Harvester alleged that: 1) fuel geysering could result in serious fires, and sometimes injure the tractor operator; 2) that Harvester was aware of this fact for many years; 3) that Harvester did not adequately notify its customers of the danger; and 4) that the tractor operators therefore took inadequate measures to protect themselves. \textit{Id.} at 23,174-75.

\textsuperscript{192} Harvester manufactured and sold gasoline-powered tractors from 1939 to 1978. By approximately 1963, Harvester was aware that its gasoline-powered tractors were subject to fuel
was whether Harvester’s failure to warn owners and potential buyers of the geysering problem constituted an unfair or deceptive practice under section five of the FTC Act. The ALJ found that the respondent’s failure to warn about the hazards of fuel geysering was a form of deception because the omission improperly implied that the tractors were fit for their ordinary use. The ALJ also found that the failure to warn was unfair because consumers were subjected to a risk of harm that they reasonably could not have avoided.

The Commission majority, which termed the respondent’s failure to warn a “pure omission,” based its decision solely on unfairness, and omitted the deception claim. Commissioner Bailey dissented from the Commission

geysering. International Harvester also knew that many tractor operators were unaware of this hazard, and that some operators had been seriously injured, or even killed, as a result. Id. at 23,175-77.

193. Section 5 of the FTC Act prohibits unfair, as well as deceptive, acts or practices. 15 U.S.C. § 45(a)(1) (“unfair or deceptive acts or practices . . . are declared unlawful”). During the past five years, the Commission has attempted to clarify what it considers an “unfair act or practice.” In 1980, the Commission prepared a formal policy statement describing its jurisdiction over unfair practices. Letter from the Federal Trade Commission to Senators Wendell Ford and John Danforth, 5 TRADE REG. REP. (CCH) 50,421 (Dec. 17, 1980). In this policy statement, the Commission stated that most unfairness cases would be brought under a consumer injury theory. According to the policy statement, an actionable consumer injury must be: (1) substantial; (2) more harmful than any offsetting consumer or competitive benefits that the practice produces; and (3) one which consumers reasonably could not have avoided. Some commentators have interpreted the Commission’s policy statement on unfairness as applying a general balancing of interests, and not a bright line economic rule. See Averitt, The Meaning of “Unfair Acts or Practices in Section 5 of the Federal Trade Commission Act, 70 GEO. L.J. 225 (1981).


195. Id. Looking to prior Commission case law under the FTC Act, the ALJ concluded: “Even where no explicit safety claim has been made, as in this case, the Commission has found that the failure to disclose such a hidden, or unknown, hazard is a deceptive practice.” Id. at 23,187. The ALJ also found that “[i]n selling its tractors, respondent gives an implied warranty that it is safe to use for its intended use, save any obvious or well-known defects or hazards.” Id. The ALJ concluded that the respondent had a continuing duty to disclose adequately that fuel geysering constituted a safety hazard, and that this failure constituted a deceptive practice.

196. Id. at 23,178.

197. The failure to disclose material facts, whether in the context of a truthful representation or a completely omitted fact, has been acknowledged by the Commission to be an important part of the law of deception. See supra note 25. This principle is codified in § 15 of the FTC Act, which expressly provides that when the Commission determines whether an advertisement for food, drug, device, or cosmetic is misleading in a material respect, the Commission shall take into account “the extent to which the advertisement fails to reveal facts material in light of such representations or material with respect to consequences which may result from the use of the commodity.” 15 U.S.C § 55 (emphasis added).

198. International Harvester Co., 3 TRADE REG. REP. (CCH) 22,217, at 23,186-87 (FTC Dec. 21, 1984). The Commission resolved the International Harvester case by holding that Harvester’s failure to disclose the potential of fuel geysering, while unfair, was not deceptive.
Although Bailey agreed that Harvester's failure to warn was an unfair practice, she dissented from the majority opinion because she believed that the respondent's conduct was also deceptive. Bailey argued that the majority ignored established deception precedent, and that the majority's findings were unfounded even under the Policy's standards. Also, she expressed concern about the precedential value of the opinion. Bailey feared that the effect of the Harvester opinion would be to limit future investigations of "hazardous commodities" advertising under a deception theory. According to Commissioner Bailey, the majority presented "no sound legal or policy reasons to justify its detour from the Commission's traditional law of deception."
Finally, in *Southwest Sunsites, Inc.*, the Commission found that three Texas land-development companies misrepresented the value of the land that they sold, and that the companies failed to disclose material facts about the land. Commission Bailey wrote an opinion for a unanimous Commission that affirmed that the realtors's practices were deceptive. Although Commissioner Bailey used the standard for deception set forth in the Policy, she stated separately in a footnote that she still does not endorse the use of this standard. Instead, Commissioner Bailey would retain the pre-policy standard of deception, which states that an act or practice is deceptive if it has "the tendency or capacity to mislead a substantial number of consumers in a material way."" The dissenter's resistance to the Policy in all four cases can be traced in part to the Commission's failure to adopt its definition through legally prescribed means. The Commission could have adopted the Policy through trade agency rules, which would have given the Policy definition of deception the authority of law. Such regulations must be adopted according to Administrative Procedure Act and FTC Act guidelines. The Commission could also have adopted the new deception standards through the course of adjudication. In an adjudication, at least, some interested parties would have been permitted to submit testimony on behalf of or against the proposed standard. Finally, the Commission could have lobbied Congress to amend the FTC Act's definition of deception.

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206. *Id.* at 23,218. The Commission's complaint alleged that respondents' land sale activities violated § 5 of the FTC Act. The following is a summary of the three count complaint. The complaint alleged that respondents:

1. misrepresented that the parcels sold . . . were good investments involving little or no financial risk and failed to disclose material information regarding their financial risk;
2. misrepresented that the properties were suitable for use as homesites, farms, and ranches and failed to disclose material facts regarding the suitability of the properties for those uses; and
3. sold parcels that were of little or no value and unfairly retained the proceeds from the sales.

*Id.* at 23,220.

207. The Commission voted 3 to 0 to issue the decision. Commissioners Terry Calvani and Mary L. Azcuenaga did not participate. *Id.* at 23,218.

208. The deception standard used by Commissioner Bailey in *Southwest Sunsites, Inc.*, stated that "an act or practice is deceptive if it consists of a representation, omission or practice that is both material and likely to mislead consumers acting reasonably under the circumstances."

*Id.* at 23,247.

209. *Id.* at 23,247 n.79.

210. *Id.* Commissioner Bailey believed that the respondents' practices were deceptive regardless of the standard of deception applied.

211. See supra notes 63-83 and accompanying text.


213. See supra notes 63-83 and accompanying text.

214. See supra notes 63-65.

215. See supra note 84 (chronicling Chairman Miller's attempts to get a statutory definition).
Unfortunately, the Commission did not pursue these legitimate routes to reform its deception enforcement practices. The Commission acted beyond its authority to adopt a new definition of deception as a Commission standard. The Commission thereby cast into doubt the legitimacy of the Policy.

The Policy also may impose substantial costs on consumers. Because the Policy weakens the standards for deception, companies will be freer to make marginally deceptive claims with impunity. If an advertisement is objectively likely to deceive consumers, and if there is no extrinsic evidence that the advertisement is deceptive, then the Commission may use the Policy to disregard complaints about those advertisements. The Policy may be interpreted in novel ways by future Commissions to further narrow Commission authority to regulate deceptive advertising.216

CONCLUSION

Chairman Miller’s purported restatement of deception is a thorough revision of that field of regulation. The Policy’s inaccurate restatement of deception law, along with the controversial procedure undertaken by the Commission to adopt the Policy, creates uncertainty regarding the legitimacy of the Policy. The only thing definite about the Policy is that it creates unparalleled confusion in the law of deception. Already, this confusion has inspired dissension in four Commission adjudications. The Commission and enforcing courts have been left with the task of enforcing deception standards that vary widely from accepted case law principles. Ironically, Chairman Miller’s Policy fails to accomplish the very purpose for which it was conceived: “to provide a greater sense of certainty as to how the concept will be applied.”217

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216. One solution to decreasing federal authority in the deception area is to increase state regulation. All 50 states and the District of Columbia have enacted some type of statute regulating deceptive acts and practices. See S. Sheldon & G. Zweibel, Survey of Consumer Fraud Law 121-22 (1978) (summarizing provisions in 49 states and the District of Columbia). In 1981, Alabama became the 50th state to enact its own version of the FTC Act. See Ala. Code §§ 8-19-1 to -15 (Supp. 1983). On the other hand, many of these state statutes parallel the FTC Act, and many state courts have drawn on federal jurisprudence in deciding lawsuits brought pursuant to these statutes. It is therefore possible that the states will adopt the policy as well. See Leaffer & Lipson, Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence, 48 Geo. Wash. L. Rev. 521, 533 (1980). See, e.g., Conn. Gen. Stat. § 42-110(B) (1983). The Connecticut statute states:

> It is the intent of the legislature that in construing subsection (A) of this section (which provides that “no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce,”) the Commissioner (of Consumer Protection) and the court of this State shall be guided by interpretations given by the FTC and the Federal courts to Section 5(A)(1) of the Federal Trade Commission Act [15 U.S.C. § 45(a)(1)] as from time to time amended.

Id.

217. Policy, supra note 3, at 56,071.