



Transition Memo on the Federal Trade Commission's *Consumer Protection Mission*

Overview of the FTC's *Consumer Protection Mission*

The ability of the Federal Trade Commission (FTC), the nation's primary consumer protection agency, to protect the public from unfair and deceptive trade practices has been greatly diminished since 1980. The FTC was at "ground zero" of the deregulation movement led by the U.S. Chamber of Commerce and conservatives of both parties on the Senate Commerce Committee. The deregulation movement of the 1980s was fuelled in no small part by the FTC's aggressive use of rulemaking authority to attack pressing consumer problems ranging from used-car marketing to junk food advertising aimed at children. Previously, the agency had sued offenders on a case-by-case basis, a time consuming and often ineffective process.

The deregulation trend continued with the appointment of Jim Miller as Chairman of the FTC by then President Reagan. The Commission's budget was sliced in half and has never recovered, notwithstanding increased opportunities for dishonest marketing over the Internet, cell phones, and other means to larger populations. Further, Mr. Miller implemented a number of institutional changes that limit the effectiveness of the FTC to this very day. Compared to other consumer agencies like the FDA or CPSC, the FTC career staff has become institutionally conservative and typically favors self-regulation. In contrast, state attorneys general have assumed leadership roles on key issues.

Actions that Can be Immediately Taken by the Administration

The Commission currently has a vacancy. *The President-Elect should nominate a new commissioner as soon as possible with an aggressive regulator selected from the ranks of the state attorneys general,*¹ and name the new appointee as Chair of the Commission (the existing chairperson would retain a seat on the Commission until the remainder of their term). The new Chair, in turn, should appoint new directors of the Bureau of Consumer Protection (BCP), Bureau of Economics (BE), Bureau of Competition (BC), and the Office of General Counsel (OGC).

Actions that Can be Immediately Taken by the New Chair of the FTC

- **Regaining the Support of the Senate Commerce Committee**

¹ We recommend Attorney General Tom Miller of Iowa, who has been a leader among state attorneys general for over two decades, particularly with regard to law enforcement efforts involving deceptive food marketing practices. He has served as President of the National Association of Attorneys General (NAAG) and received NAAG's Wyman Award as the Attorney General who contributed most to NAAG and its members. He has chaired several NAAG committees and led major multi-state working groups working on tobacco issues, antitrust enforcement, agriculture, and consumer protection. He would help restore vitally needed vigor to an agency depleted of staff over the past several decades.



This Committee has been heavily lobbied by the US Chamber of Commerce, the American Advertising Federation, the National Association of Manufacturers, and other leaders of the business community. The Committee was controlled by the Democrats when it initially clipped the agency's wings in 1980. *Regaining support of the Senate Commerce Committee should be a top priority of the new FTC Chair.*

- **New Priorities for the Bureau of Consumer Protection**

The new Chair should appoint a new director of the Bureau of Consumer Protection from the ranks of state enforcement officials. A person who has a proven track record of aggressive litigation against companies engaging in unfair and deceptive trade practices should be chosen. The new BCP director should re-orientate the Bureau's enforcement priorities away from matters that are simply the subject of consumer complaints toward trade practices that harm consumers the most. Such matters often include unfair and deceptive trade practices that consumers are not aware of.

The new Director of the Bureau of Consumer Protection should withdraw the 1980s policy statement that unilaterally limited the scope of the FTC's authority over deceptive trade practices in order to justify a reduction in FTC enforcement activity. The deception policy statement specifies that the FTC will only challenge a trade practice that deceives a "reasonable person," the standard used in common law tort, which has been viewed since the New Deal (until the beginning of the Reagan Administration) as too weak to protect consumers because it requires proof of actual damages, thus failing to protect consumers from injuries before they occur. The deception policy statement was never accepted by many state attorneys general and has served as an invitation for courts to overturn aggressive consumer protection measures.

- **Changing the Role of the Bureau of Economics**

The Chair should appoint a new director of the Bureau of Economics from outside the Agency and remove the authority of the BE to review litigation and rulemaking actions proposed by the Bureau of Consumer Protection. The new director should also terminate the practice of having the Bureau of Economics submit comments for the administrative record that opposes consumer protection measures proposed by the FDA and other federal agencies. The new director should also re-focus the Bureau's function on litigation support for the Bureau of Consumer Protection and direct BE staff to produce economic studies quantifying the harm from specific unfair and deceptive trade practices.

- **Expanding the Office of General Counsel**

The Chair should instruct the new General Counsel to take steps encouraging the judiciary to reconsider the commercial free speech doctrine in cases where it has prevented effective regulation of unfair and deceptive trade practices involving serious public health issues. OGC staff should publish law journal articles advocating narrower interpretations of the commercial free speech doctrine, conduct legal symposiums for members of the



judiciary, sponsor BAR Association workshops, and work with the academic community to develop long-term strategies to reverse recent court decisions impeding consumer protection regulation of unfair and deceptive trade practices.

- **Reforming the International Affairs Program**

The Chair should direct the FTC's Office of International Affairs, which has championed free markets and self-regulation to refocus its efforts. The office should devote itself to researching advanced consumer protection measures implemented in Europe and elsewhere that would serve American consumers well, and propose how such measures could be adopted in the United States.

Priorities for 2009-2010 –

Improving Health and Facilitating Universal Health Care Coverage

The FTC should be given a major role in advancing the Administration's prevention strategy, which will reduce health care costs and advance the cause of universal health care coverage.

- *The Bureau of Consumer Protection can strengthen efforts to halt unfair and deceptive marketing of junk foods to kids, as well as alcoholic beverages, tobacco, and other products affecting consumer health and wellbeing. The Bureau should commence a law enforcement investigation of the advertising of alcoholic beverages during college sporting events (where significant percentages of the audience are under the legal drinking age). The Bureau should also periodically re-evaluate the effectiveness of various voluntary measures taken by the food industry to limit junk food advertising to children.* The Bureau should first propose a framework for directly overseeing a new and more effective self-regulatory program by the food and advertising industries, as recommended by the U.S. National Academy of Sciences – Institute of Medicine report on food marketing to children. If necessary, the Bureau should issue a report to Congress on the need for restoration of the Commission's authority to curb unfair trade practices directed at children.
- The Bureau of Economics should provide support for those measures, quantifying the health harm caused to children and youth by unfair and deceptive marketing practices, and the health benefits of restricting such practices.