THE FTC'S ADVERTISING SUBSTANTIATION PROGRAM

GoverNMENT controls continue to play a large part in marketing decision making despite a movement toward deregulation. This paper focuses on one regulatory mechanism which currently affects many marketers and apparently will continue to do so in the future—the FTC advertising substantiation program. In justifying its budget to Congress, the FTC declared that one of the salient matters included in its consumer protection for 1980 is monitoring of advertising and initiation of substantiation cases (Trade Regulation Reports 1979a). This paper presents a comprehensive review of the relevant cases, offers suggestions for managerial policies designed to meet this regulatory requirement, and raises questions concerning an evaluation of the program from a public policy perspective.

History of the FTC's Advertising Substantiation Program

The initial concept to require substantiation of advertising claims emerged from the activities of the Center for the Study of Responsive Law (a Ralph Nader organization) which requested that various companies document their advertising claims based on unspecified tests or clinical studies. Many companies ignored these requests, others merely declared they were true without offering evidence, and some challenged the right of consumers to make such requests. Nader, along with other consumers and consumer groups, petitioned the FTC to promulgate a trade regulation rule that would require firms to substantiate claims, and requested such information be released to the public (Nader, Adams et al. 1970).

In 1971, the FTC adopted a resolution designed to “assist consumers to make rational choices.” The new procedure outlined in the resolution required that advertisers submit on FTC demand tests, studies, or other data that purport to substantiate advertised claims regarding a product’s safety, performance, efficacy, quality, or comparative price (Trade Regulation Reporter 1971).

According to Commissioner Kirkpatrick, then chairman of the FTC, this was not a rule requiring adequate substantiation nor was it intended to cast doubt upon the continued propriety of “puffing” in advertising. But it was designed to disclose the existence of substantiation. Thus, if someone says “tastes great,” no documentation was required; however, if someone says “stops three times as fast,” the Commission would ask to see proof. The significance of this resolution was that it would provide public access to such documentation.

In the first industry “substantiation rounds,” members of various industries, including manufacturers of automobiles, tires, soaps and detergents, refrigerators, television sets, air conditioners, hear-
ing aids, and over-the-counter drugs were required to provide the Commission with documentation in support of designated advertising claims, such as the stopping-and-holding performance of a tire, the germ-killing effectiveness of a cleansing agent, and the reduction of annoying noises in a hearing aid.

An early evaluation of the program examined it in terms of two kinds of possible impact: as an educational device and as a deterrent (Antitrust and Trade Regulation Report 1972). As an educational device, the program was considered to have limited value as a vehicle for product information, since advertising for any particular product rarely discusses all characteristics relevant for a fully informed purchase decision. Moreover, few consumers were availing themselves of the opportunity to study the documentation and much of the data offered was complex and technical. The Commission's report noted that it was too early to determine the program's deterrence value.1

The FTC, however, began to widen the scope of its substantiation program. In its initial resolution, the FTC had announced that the program's primary purpose was to gather information from companies concerning documentation available in support of their advertising claims and that it was not filing complaints nor suggesting that companies were guilty of any violations. After receiving documentation from numerous companies, however, the FTC issued a number of consent order decrees requiring various companies to discontinue making inadequately substantiated claims. Whirlpool was ordered to discontinue referring to its "panic button" as unique (only the name used to indicate fast cooling was unique) and Fedders was told to stop calling its "reserve cooling system" unique. General Motors was told to discontinue declaring that "Vega handles better" and Firestone was ordered to stop advertising that its tires "stop 25% faster" (Trade Regulation Reporter 1972).

The substantiation concept was broadened considerably in 1972 in a complaint issued against a drug manufacturer charging the company with unfair and deceptive advertising for its new product "Unburn" ("In re Pfizer, Inc." 1972). Although charges against Pfizer were ultimately dismissed, the opinion expressed by the Commission has been used as the basis for most of its subsequent complaints relevant to adequate substantiation.  

1 Also proposed in 1971 was a Truth-in-Advertising Act that would require anyone disseminating an advertisement concerning the safety, performance, efficacy, characteristics, or comparative price of any product or service make available for public inspection all documentation in support of such claims. This proposal was not adopted.

Kirkpatrick explained the obligation of advertisers to substantiate advertising claims before they are made ("In re Pfizer, Inc." 1972). In the opinion of the Commission, it is unfair and illegal to advertise an affirmative claim for a product without having "a reasonable basis" for making such a claim. Such unfairness may exist even if the claim is true or if the product performs as advertised. According to the Commission, the fundamental unfairness results from imposing on the consumer the unavoidable economic risk that the product may not perform as advertised, if neither the consumer nor the manufacturer has a reasonable basis for belief in the product claim.

The widespread and sweeping implications of this opinion were tempered by the interpretation of what constitutes a reasonable basis for product claims. This was considered essentially a factual issue and at the time it was decided that formulation of a "reasonable basis" standard would be determined on a case-by-case basis. Furthermore, in advertising substantiation proceedings, the FTC staff has the burden of proving that the questioned claim appeared in the advertising and that the company did not possess and rely upon adequate substantiation prior to disseminating the claim (Snyder 1975). Nevertheless, this new concept was of major significance to the advertising community. In the past, the regulatory agency was required to prove that claims made in advertising were deceptive or unfair. This program places an affirmative responsibility on advertisers who are now required to have documentation indicating that they have a "reasonable basis" for making a claim prior to the dissemination of the ad.

The Scope of Responsibility for Substantiation

The advertising substantiation program has a clear impact on many manufacturers' advertising decisions; moreover, the responsibility for substantiation of the claim has been expanded beyond the producer of the advertised product. The FTC's position, expressed in a number of recent complaints and orders, indicates that in addition to the manufacturer of the product, the advertising agency who prepares the ads (Trade Regulation Reporter 1978f, 1979b), the retailer who disseminates the ads (Trade Regulation Reporter 1977b), and even the celebrity who endorses the ads (Trade Regulation Reporter 1978c, 1979c) may be responsible for the "reasonable basis" requirement. Some of these cases have not yet been finalized and are still subject to review by the courts; however, the reasonable basis requirement for advertising agencies has been upheld.
by the courts. The FTC has indicated that the advertising agency may rely on substantiation furnished by its client, but it must evaluate such substantiation as to a reasonable basis (Trade Regulation Reporter 1979b).

### TABLE 1
**FTC Policy Planning Protocol for Substantiation Actions**

<table>
<thead>
<tr>
<th>Consumer Interpretation of Claim</th>
<th>A list is prepared of the main interpretations consumers would place on the advertisement, including those that might render the claim substantiated or unsubstantiated.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Scale of Deception</td>
<td>An effort is made to determine the relative proportions of consumers adhering to each of the interpretations listed.</td>
</tr>
<tr>
<td>Materiality</td>
<td>In examining materiality (the fact that the claim is likely to influence the purchase decision), the Commission attempts to determine what consumers would do in their purchase decisions if they knew the truth about the product.</td>
</tr>
<tr>
<td>Adequacy of Corrective Marketing Forces</td>
<td>Product claims are considered to fall into three categories representing different “qualities” relevant to information processing:</td>
</tr>
<tr>
<td>Search qualities</td>
<td>Concern product claims whose truth the consumer can determine for himself prior to purchase (e.g., a claim that the refrigerator door is “bright” yellow).</td>
</tr>
<tr>
<td>Experience qualities</td>
<td>Concern attribute claims which the consumer can only assess on the basis of actual experience with the product. If the product is safe and inexpensive, then the market may correct a deception when a product fails to perform as advertised (e.g., a claim that one deodorant is “less runnier” than another).</td>
</tr>
<tr>
<td>Credence qualities</td>
<td>Relate to claims that a consumer cannot evaluate for himself (e.g., claims of efficacy of an OTC drug). Because the market is least likely to correct deceptions having credence qualities, such claims are more likely to be considered in enforcement procedures.</td>
</tr>
<tr>
<td>The Effect on the Flow of Truthful Information</td>
<td>The FTC examines whether the standard of truth or substantiation that is applied makes it extremely difficult to make the type of claim in question.</td>
</tr>
<tr>
<td>Deterrence</td>
<td>This consists of communicating the legal standards and determining whether enforcement action would have substantial impact on the advertising community.</td>
</tr>
<tr>
<td>Law Enforcement Efficiency</td>
<td>This examines whether another agency has or should take action with respect to the claim and the difficulties involved in litigating a case arising from challenges to the claim.</td>
</tr>
<tr>
<td>Public Interest</td>
<td>These considerations include the effect of the claim on a vulnerable group and/or the general public interest.</td>
</tr>
</tbody>
</table>


The FTC Policy Planning Protocol

In implementing this program, the FTC conducts industry “substantiation rounds” and maintains continuing surveillance of advertising claims, taking note of those that are unique or unusual.

The program is initiated in a particular case by an order from the Commission, which requires an advertiser to submit all test studies, research, and other data and materials that provide a basis for a questioned advertising claim (Snyder 1975). Substantiation material is then analyzed by the staff and expert consultants. If the staff believes that the claims have not been adequately substantiated, a recommendation is made to the Commission that a formal proceeding be initiated against the advertiser.

The FTC does not have clearly specified rules or criteria for enforcing its advertising substantiation programs; it has, however, prepared a broad set of guidelines for staff use in determining when action should be taken. In order to help make specific case choices, the Commission’s “Policy Planning Protocol” concerning deceptive and unsubstantiated claims contains questions that fall in eight general areas (FTC, DNA & OPPE undated). All of these questions need not be answered, nor are answers to most of these necessary to indicate the need for action (See Table 1).

Adequate Substantiation: What Is It?

It is clearly in the interest of advertisers to have some listing of the kinds of data that would be considered adequate substantiation. Unfortunately, according to a FTC staff member, “adequacy of substantiation . . . cannot be considered in the abstract” (Herzog 1976). The requirements vary in accordance with several relevant factors. Two important considerations relate to the kind of product for which the claim is made and the particular representation, express and implied, in the ad.

A review of the recent FTC complaints and procedures, as well as relevant court decisions, reveals a number of requirements for adequate substantiation (See Table 2). This listing serves to indicate the kinds of claims examined and the kinds of documentation that may be required. However, no consistent rationale for FTC action emerges. While it is apparent that claims with the greatest potential for harm such as safety and efficacy representations have been considered...
TABLE 2
Substantiation Requirements Emerging from FTC Cases (Illustrative, Not Comprehensive)

<table>
<thead>
<tr>
<th>Documentation Required to Substantiate Claims</th>
<th>Claims</th>
<th>Product</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competent scientific tests</td>
<td>safety and efficacy claims</td>
<td>auto tires&lt;sup&gt;a,b&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td>comparative handling claims</td>
<td>cosmetics&lt;sup&gt;c&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>hair care products&lt;sup&gt;f&lt;/sup&gt;</td>
</tr>
<tr>
<td>Independent laboratory tests</td>
<td>fuel economy</td>
<td>autos&lt;sup&gt;e&lt;/sup&gt;</td>
</tr>
<tr>
<td>Competent and reliable scientific test or the opinion of experts</td>
<td>cleaning claims</td>
<td>dishwashers&lt;sup&gt;f&lt;/sup&gt;</td>
</tr>
<tr>
<td>Tests, including demonstrations, experiments, surveys, reports, and studies</td>
<td>structural strength and quietness</td>
<td>autos&lt;sup&gt;g&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td>dependability and reliability claims</td>
<td>appliances&lt;sup&gt;b,i&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td>superiority claims*</td>
<td>appliances&lt;sup&gt;b,i&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>sugar&lt;sup&gt;l&lt;/sup&gt;</td>
</tr>
<tr>
<td>Competent scientific engineering data</td>
<td>air cooling power</td>
<td>air conditioners&lt;sup&gt;s&lt;/sup&gt;</td>
</tr>
<tr>
<td>Competent and objective material available in written form that fully and completely substantiates safety or performance characteristics</td>
<td>safety and performance</td>
<td>&quot;all products&quot; of a mail order company&lt;sup&gt;j&lt;/sup&gt;</td>
</tr>
<tr>
<td>Opinion of a qualified person that competent tests or other objective data exists</td>
<td>comfort claims</td>
<td>denture adhesive&lt;sup&gt;m&lt;/sup&gt;</td>
</tr>
<tr>
<td>Written certification from a reliable source</td>
<td>beautification claims</td>
<td>wrinkle remover&lt;sup&gt;n&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

*If tests are used for superiority claims, results must establish the comparative superiority which must be discernible or beneficial to the class of consumers to whom the representation is directed.

Sources: <sup>a</sup>Trade Regulation Reporter (1976a)<br> <sup>b</sup>Trade Regulation Reporter (1976b)<br> <sup>c</sup>Trade Regulation Reporter (1976c)<br> <sup>d</sup>Trade Regulation Reporter (1976d)<br> <sup>e</sup>Trade Regulation Reporter (1974)<br> <sup>f</sup>Trade Regulation Reporter (1975b)<br> <sup>g</sup>Trade Regulation Reporter (1979b)<br> <sup>h</sup>Trade Regulation Reporter (1967a)<br> <sup>i</sup>Trade Regulation Reporter (1977a)<br> <sup>j</sup>Trade Regulation Reporter (1977b)<br> <sup>k</sup>Trade Regulation Reporter (1979d)<br> <sup>l</sup>Trade Regulation Reporter (1979g)<br> <sup>m</sup>Trade Regulation Reporter (1979a)<br> <sup>n</sup>Trade Regulation Reporter (1979d)

frequently, it is equally evident that less harmful, quality claims such as dependability, reliability, or superiority, also have been subject to numerous FTC orders. Substantiation orders have been placed against widely used products (autos and appliances) as well as those with less widespread usage such as wrinkle removers. Nor does the FTC planning protocol offer a clear explanation for the selection of these specific cases. In considering the “adequacy of corrective marketing forces” and consumer information processing, for example, many of the questioned claims appear to represent “experience qualities”—that is, attribute claims which the consumer can only assess on the basis of actual experience with the product. In many cases, the products are relatively expensive (autos and appliances) and therefore action may be appropriate, according to the guide. In others, however, some of the products are safe and relatively inexpensive (denture adhesives and sugar) and therefore the “market may correct the deception.” Furthermore, relatively few of the claims represent “credence qualities,” claims which the consumer cannot evaluate for himself which the guide indicates are more likely to be considered in enforcement procedures.

In addition to considerations of the kind of product advertised and the kind of claim made, there are indications that the past history of the firm may be significant in substantiation decisions. Recently a Court of Appeals upheld an FTC order prohibiting a mail order firm from “representing the safety and performance characteristic(s) of any product unless . . . they . . . have a reasonable basis for the representations consisting of competent and objective material available in written form that fully and completely substantiates such characteristic(s)” (Trade Regulation Reporter 1979d). The court
rejected the company’s complaint that the order was too broad (since it covered all the company’s products and all safety and performance claims) on the grounds the company had a past history of misrepresentations.

As noted, required documentation for substantiation may vary from “competent scientific tests” to “opinion of qualified person that objective data exists.” Generally, the most rigorous documentation is required for safety and efficacy claims; however, similar substantiation also is required of some performance claims.

The Meaning of the Ad

In examining an advertisement to determine whether or not there is a reasonable basis for a product claim, the FTC may consider it from two perspectives. If the advertiser acknowledges that a specific claim was made, the issue becomes “is this claim adequately substantiated?” For such circumstances, Table 1 offers some of the documentation required. The second perspective occurs when, according to the FTC, a claim appears and the advertiser does not acknowledge that such a claim was made. Then the issue becomes interpreting the meaning of the ad.

Various court decisions have affirmed that the Commission has the authority to interpret advertisements; thus the meaning of the ad is considered subject to the discretion of the FTC (Pitofsky 1977). And it is not necessary for the FTC to rely on any extrinsic evidence, such as consumer research on the meaning of the ad. In fact, should consumer survey evidence be presented, it still may not persuade the Commission. “Meaning,” in many cases, depends on consumer perceptions and if consumer perceptions were a litigable issue, survey evidence or testimony by experts on consumer perceptions would be required. At the present time, it appears that the science of measuring consumer perception is imprecise. The grant of authority to the Commission to determine meaning may be due to the administrative inconvenience of alternative approaches.

Consumer Research for Interpreting Meaning

Despite the FTC’s interpretive authority and the fact that consumer evidence is not required, the FTC staff believes that consumer surveys can greatly assist in ascertaining the meaning that a representation conveys. Administrative law judges and the Commission have used the results of “adequately conducted” surveys to supplement their expertise in determining what messages flow from advertisements (Snyder 1975).

Consumer research may be offered by the FTC and/or the advertisers to interpret the meaning of the message. The FTC, for example, used consumer copy tests to assist in determining the messages in Warner-Lambert’s advertisements for “Listerine.” The copy tests conducted by a research firm showed that consumers recalled cold prevention and relief messages in response to unaided recall questions (Trade Regulation Reporter 1979e). Firestone successfully used a consumer survey to refute the allegation that its brand name “Safety Champion” represented that the tires were “safer than all other tires.” The survey showed that only 1.4% of those interviewed selected the tire named “Safety Champion” as one with unique performance or construction characteristics, making it safer than others.

Consumer research is not only relevant to interpreting the meaning of the ad, but the broader-based surveys about consumer beliefs, attitudes, and behavior are increasingly useful to the FTC. For instance, a survey inquiring about consumer purchase behavior regarding a selected group of products, or a comparative ranking survey of several attributes of one product, will oftentimes decide the question of where a particular claim is material or “important” to consumers. Such data can be used in FTC policy decisions concerning substantiation requirements.

For consumer survey evidence presented by firms to be admissible for FTC consideration, however, the surveys must be conducted in a manner that is methodologically sound (Morgan 1979). Furthermore, an issue of particular significance to firms that use survey data as evidence in response to a complaint is the possibility that the FTC may subpoena the company to submit unfavorable as well as favorable surveys.

Demonstrations

In interpreting the meaning of an advertisement, the FTC may examine a visual demonstration in addition to verbal statements. A Court of Appeals recently held that although a product claim may be true, a visual demonstration which does not accurately depict the product’s performance in relation to this claim may be misleading and deceptive.

The Court of Appeals upheld an FTC order requiring Standard Oil of California and its advertising agency to provide prior documentation for future advertising claims for the gasoline additive F-310 (Trade Regulation Reporter 1978f). The court
declared that there was sufficient evidence to prove that F-310 provided significant reductions in air pollution. Nevertheless, it found that the ads reinforced the erroneous assumption that the absence of black smoke from the exhaust meant an absence of pollutants when, in fact, most pollutants are invisible.

Although the company offered engineering documentation in support of the claim, according to the court, such substantiation was inadequate since it did not focus on the accuracy of the implicit meaning—F-310 eliminated all pollutants—conveyed to the viewing public.

**FTC Remedies for Substantiation Violations**

Various remedies are available to the FTC for violation of substantiation requirements. Potential penalties are similar to those imposed for any "unfair or deceptive act or practice," since the Commission considered substantiation violations to fall within this class of activities.

Remedies range from consent or cease-and-desist orders requiring the firms to stop the challenged practice, after which penalties may be imposed for violations of the order, to affirmative disclosure requirements, corrective advertising, and restitution. Injunctive orders in cases of food, drugs, and cosmetic product claims are also possible.

For example, in a consent order proceeding, the FTC required a mail order company to substantiate future claims for its skin cream, diet plans, vitamin supplements, and other products affecting physical appearance (Trade Regulation Reporter 1978e). An affirmative disclosure requirement in the order states the company is to disclose any health or cosmetic risks their products pose and restitution is to be made in the form of full refunds for products whose claims were not adequately substantiated.

**Corrective advertising** is required in a case emerging from an early "substantiation round" in the analgesic industry. The FTC had issued complaints against major manufacturers of analgesic products charging that no reliable scientific evidence exists to support claims that products such as "Bayer Aspirin," "Cope," "Vanquish," "Midol," "Excedrin," "Bufferin," and "Anacin" relieve nervous tension and similar symptoms. In a recent initial decision by an administrative law judge, American Home Products is required to spend $24 million on future ads containing the statement "Anacin is not a tension reliever" (Trade Regulation Reporter 1978a). This decision will most likely be litigated on issues such as whether or not there is adequate substantiation and the specific corrective requirements. However, the Supreme Court's refusal to review the Warner-Lambert case (Trade Regulation Reporter 1978g), requiring corrective advertising for "Listerine," supports the FTC's power to order such a remedy.

The FTC has used its injunctive powers relevant to unsubstantiated advertising claims for food, drugs, cosmetics and medical devices. The mail order marketers of "Acne-Statin" agreed to a temporary injunction prohibiting certain claims for their acne treatment product during the course of the proceeding against the firm (Trade Regulation Reporter 1978d).

**Corporate Responsibility**

The importance of information systems in increasing managerial competence is generally accepted by the business community. Recent, specific suggestions in this area include the development of marketing management information systems to directly support marketing decisions (King 1977). One recommended subsystem within this MMIS is designed to encompass regulatory factors and generates information relevant to marketing decisions from various sources including public, government, business periodicals, professional associations and the trade press. Importantly, management must become involved in the design and evolution of this system to insure that it provides useful information, is cost/effective, and so on. This must be a two-way system where management can offer insights to public policy makers relevant to regulatory decisions.

The utility of such a system in the case of advertising substantiation has been underscored by Richard B. Herzog (1976), assistant director for National Advertising of the FTC:

> The requirement of substantiation is a requirement that substantiation be possessed and relied upon at the time of the first dissemination of the ad. Ex post facto substantiation is not a legal defense. Documents in the corporate basement or library that were not in the corporate mind when the ad was prepared; opinions or general knowledge that was possessed by individuals within the corporation but not communicated to those actually involved in the preparation of the ad are all insufficient (p. 21).

Herzog also notes management's specific responsibility in this area:

> Many of the instances of so-called inadequate substantiation turn largely on the use that was made of a body of data, rather than on the inherent validity or reliability or technical adequacy of the data itself. The special responsibility of managers
is to insure that something does not get lost in
the translation . . . many instances of substantia-
tion actually arise not because there is anything
inherently wrong with the substantiation itself but
because of the use that was made of the substantia-
tion in a particular product (p. 19).

This issue was raised, for example, in the case
of Standard Oil of California’s F-310, discussed
earlier. The court found that there was adequate
substantiation to prove that F-310 reduced air pollu-
tion, but that the demonstrations in the ad misrepre-
sented this claim (Trade Regulation Reporter 1978f,
1979a).

In designing a MMIS system relevant to the
advertising substantiation program, information
should be disseminated to anyone having a potential
involvement in advertising decisions. As an exam-
ple, this can include:

- The kinds of claims that require a “reasonable
  basis” prior to dissemination, e.g., the prod-
  uct’s safety, performance, efficacy, quality,
or comparative price.
- The FTC’s enforcement policies relevant to
  substantiation requirements (some of this
  information is available in Table 1).
- The kinds of documentation that may be
  required as a “reasonable basis” for a claim
  (a review of substantiation cases such as those
  presented in Table 2 is helpful for this
  purpose).
- Questions that are to be answered relevant
  to specific advertisements, include:
  Is there an “implied” claim consumers may
  perceive which is not adequately substantiat-
ed?
  Is a claim which is adequately substantiated
  presented in a manner that may be considered
  a misrepresentation?

In addition to developing an information system,
ﬁrms and their advertising agencies can conduct
consumer research that may be mutually beneﬁcial
to the firm and the FTC. As noted, a dispute often
centers around the meaning of the ad, and the FTC
may ﬁnd that companies do not have substantiation
for the implied meanings. One way to avoid this,
according to the FTC, is to pretest the ad to
the FTC’s “Policy Planning Proto-
col” for unsubstantiated claims offers some useful
insights into the agency’s considerations in its ad-
vertising substantiation program. However, it does
not provide any basis for priority considerations.
This is reﬂected in the apparent lack of consistent
evidence for priority rationale for FTC actions in this area and results
in confusion for marketers who wish to adhere
to the required guidelines.

Will it improve the advertising environment by
providing consumers with assurances that claims
are adequately substantiated? This depends on both
consumers’ perceptions of the extent and impor-
tance of inadequately substantiated claims and the
impact of the FTC’s activities. A study of consumer
complaint-handling practices conducted by Techni-
cal Assistance Research Programs, Inc., under the
sponsorship of the White House Ofﬁce of Consumer
Affairs, was designed to provide the consumer
affairs community with a data base for priority
 testing and policy making (Grainer, McEvoy, and
King 1978). Preliminary ﬁndings indicated that “de-
ceptive advertising” ranked eleventh among 22
 types of consumer problems. Apparently the fact
that the store did not have the product advertised
for sale (ranked ﬁrst) and distasteful or offensive
advertising (ranked eighth) were more salient prob-
lems. Nonetheless, one cannot conclude from this
study that consumers are not concerned with adver-
tising claims that are not adequately substantiated.
While not speciﬁcally related to advertising repre-
sentations, unsatisfactory performance and quality
of the product, unsatisfactory repair, and unsatis-
factory service were second, third, and fourth
respectively among households reporting consumer
problems.

The impact of the FTC’s activities in this area
is difﬁcult to evaluate. While the Commission has
placed substantiation activities on its listing of
consumer protection items budgeted for 1980, they
excessively restrictive to marketers. Such research
may assist the Commission in requiring information
disclosures that communicate in an effective and
understandable manner to consumers and yet are
not overly burdensome to industry.
do not appear to have a high priority. Robert Reich (1979), director of the FTC's Office of Policy Planning, declared that in the area of advertising the FTC spent more money dealing with state restrictions of advertising than on deception. Whether more funds and/or effort should be allocated to the substantiation requirements program requires a cost/effectiveness evaluation.

Will it eliminate the need for extensive consumer protection after the fact? According to Pitofsky (1977), since market incentives are sometimes inadequate to ensure the availability of important product information and since it is virtually impossible to redress consumer injuries after the fact, a consumer-oriented program should emphasize required disclosure of accurate and important product information that consumers could then use to protect their interests in advance of injury to health, safety, or pocketbook. A recent report concluded that victims of unfair business practices get limited help from the FTC particularly in the matter of redress, that is, satisfaction for losses resulting from unfair or deceptive business practices (General Accounting Office 1978). Although the substantiation program does not provide complete assurances of prior protection, it is one step in such a direction since it requires advertisers to validate objective claims.

Will it improve the competitive environment by assuring competitors that their rivals will be restrained from making excessive claims that cannot be substantiated and that may adversely affect their product's market position? In scores of proceedings in which the FTC successfully challenged the truth of major advertising themes, there are few instances in which rivals used their own access channels of consumer information to expose deceptions (Pitofsky 1977). Even where comparative demonstrations were successfully challenged by the FTC as false and misleading, the company whose product was explicitly portrayed in an adverse light did not use counter-advertising to challenge the validity of the deceptive comparison. This apparent lack of action by "injured" competitors seems to indicate that a program monitoring advertising for adequate substantiation may minimize the potential for competitive injury.

Numerous firms, however, have challenged rivals' unsubstantiated claims either through the courts or through self-regulatory groups such as the National Advertising Review Board. In fact, Pitofsky recently declared that the "remarkable" success of the National Advertising Review Board is one of the major reasons for the recent decline in the number of individual cases filed by the FTC against deceptive advertising (Trade Regulation Reports 1979b). It may be that firms prefer self-regulation rather than government intervention.

Does the program restrict the dissemination of useful information? The requirement that advertisers possess substantiation prior to the dissemination of an ad may involve not only constitutional issues such as "prior restraint" and freedom to truthfully advertise, but significant societal questions concerning what kinds of information consumers will be receiving.

The advertising substantiation program is directed primarily at claims that relate to the safety, performance, efficacy, quality, or comparative price of a product. "Puffery" claims, such as the toothpaste that "beautifies your smile," or "Coca-Cola is the Real Thing" do not require substantiation. This suggests the program may cause manufacturers to present less objective information in their ads—to avoid the possibility of extensive and costly litigation. Furthermore, advertisers and their agencies complain the program tends to stultify their creativity and results in ads less likely to attract the attention of audiences to their useful information.

A study was conducted to investigate changes which may have occurred in the content of advertising following the inception of the advertising substantiation program (Healy 1978). Print ads for four industries appearing in 16 consumer magazines in 1970 and 1976 were examined. While it is difficult to infer causality, the study revealed that anti-perspirants and pet foods evidenced a change from using claims which simply sounded verifiable to handling verification in one of two extreme ways—providing verification for the claim in the ad itself or presenting the claim in a vague, ambiguous, and uncertain unverifiable manner. This change was not as great in the case of skin lotions and prepared foods. However, there was no confirmation of the conjecture that following the advertising substantiation program, ads in these industries would exhibit a change in the level of informativeness.

The legal aspects are yet to be resolved. In a recent case, a Court of Appeals upheld an FTC cease-and-desist order that required a mail order seller to have full and complete substantiation before making a safety and performance claim for any product (Trade Regulation Reporter 1979d). The court rejected the First Amendment defense and the complaint of prior restraint. According to the appeals court, while under the traditional First Amendment doctrine prior restraint of speech may still be considered unacceptable, comments by the Supreme Court in two recent cases (Freidman v. Rogers 1979; Ohralik v. Ohio State Bar Association
declared an unsubstantiated claim to be deceptive as well as unfair. The advertising substantiation program since the Commission has actions. Restrictions on its use, however, need not seriously limit inapplicable.

Does this program lead to excessive control and, in effect, censorship? In recent years, the FTC has been moving away from the case-by-case approach in litigation to the pursuit of programs with a larger economic impact. Such activities are supported by the 1975 Magnuson-Moss Warranty-FTC Improvements Act which provided the FTC with the authority to establish “case law.” Under this new authority, if the Commission has previously determined that certain practices are unlawful, it may now spell out requirements for prevention of such practices and impose penalties for violations of these requirements. Prior to this, the FTC could sue a company for violation of an order only if that order had emerged from proceedings involving the company. Now if, in prior cases against other companies, the Commission has determined an act or practice unfair or deceptive, they may sue any company who is engaging in similar acts or practices for penalties. Furthermore, the Act gives the Commission the power to promulgate trade regulation rules which define unfair or deceptive acts or practices within an industry or group of industries. 3

For example, following the conclusion of the case concerning ads for Block Drug Co., the FTC alerted several pharmaceutical companies to the “law” on advertising claims regarding denture products as it was established by the FTC in the Block Drug case (Trade Regulation Reports 1979c). The Commission reminded the firms of possible liability for civil penalties, outlined its general rules regarding substantiation of performance claims and tests, and capsulized the rules concerning the advertising of denture products. Furthermore, the FTC recently secured its first “all products” substantiation order (requiring a firm to have full and complete substantiation before making safety and performance claims for any product). Thus the possibility is raised that through designating “acceptable documented advertising claims” for numerous products, the FTC would become a clearing house for permissible forms of expression.

Summary

The FTC’s advertising substantiation program currently affects marketing decision makers and apparently will continue to do so. This paper presented the genesis and status of the program and suggested that the firm adopt a strategy for “managing” this regulatory requirement. This strategy should include a system for disseminating information relevant to the program and its requirements throughout the organization and consumer surveys for gathering relevant information. A public policy perspective requires a comprehensive evaluation of the advertising substantiation program. Such an evaluation was considered beyond the scope of this paper; however, relevant questions have been offered as a means of determining its effectiveness.

REFERENCES


The firm appealed to the Supreme Court to review this decision. In December 1979, the Supreme Court refused this review, thus upholding the decision.

The advertising substantiation program is not a direct target in the controversy over the alleged abuse of power by the FTC since the Magnuson-Moss Act. However, there has been congressional criticism of the FTC’s interpretations of “unfairness” in exercising its statutory power to prevent “unfair or deceptive acts or practices.” Unfairness is the primary basis for FTC substantive actions. Restrictions on its use, however, need not seriously limit the advertising substantiation program since the Commission has declared an unsubstantiated claim to be deceptive as well as unfair.

“In re Pfizer, Inc.,” 81 FTC 23 (1972).


Snyder, Wallace S. (1975), Address to the American Marketing Association, New York Chapter conference (October 23), 2–5.


——— (1972), “In re Fedders Corp. et al.,” 3 (September), ¶ 20,103.


——— (1975b), “In re Chrysler Corp.,” 3 (September), ¶ 21,002.

——— (1975c), “In re Parker Advertising, Inc.,” 3 (October), ¶ 21,027.


——— (1976c), “In re Matsushita Electric Corp. of America,” 3 (December), ¶ 21,249.


——— (1978f), *Standard Oil of California v. FTC; Batten, Barton, Durstine, & Osborn, Inc. v. FTC*, 5 (July), ¶ 62,145.


*Trade Regulation Reports* (1979a), No. 386 (May 21), Chicago: Commerce Clearing House, Inc., 12.

