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Souped Up Affirmative Disclosure Orders of the Federal Trade Commission

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SOUPED UP AFFIRMATIVE DISCLOSURE ORDERS OF THE FEDERAL TRADE COMMISSION

*by William F. Lemke, Jr.**

I. INTRODUCTION

Under section 5(b) of the Federal Trade Commission Act the Commission is given authority to conduct hearings, make findings and issue cease and desist orders requiring any person, partnership or corporation to cease and desist from use of unfair methods of competition or unfair or deceptive practices in commerce.[1] The Commission also issues consent orders in cases which are concluded by agreement between the Commission and the allegedly offending party.[2] Consent orders have the same force and binding effect as those issued after hearings and findings.[3]

Although it is well established that the Commission has very broad discretion and authority in framing the scope of its orders, there are limits on its power.[4] It is the thesis of this paper that the Federal Trade Commission has exceeded its broad authority to fashion cease and desist orders in its recent proposal to include in some cease and desist orders a requirement that the respondents against whom the orders are issued must disclose in their subsequent advertising that a cease and desist order is standing against them because of claims they made in prior advertising.

One of these is Standard Oil Company of California,[5] where the Federal Trade Commission has issued a complaint challenging certain advertising claims made by Standard for its Chevron brand gasoline. The gasoline has an additive known as F-310, which is claimed by Standard to have significant effect in reducing the amount of unburned hydrocarbons and carbon monoxide emissions in automotive exhaust fumes, thereby contributing to the reduction of air pollution. The Commission has challenged the F-310 claims as unfounded and deceptive. It has proposed a cease and desist order which, in addition to requiring Standard to

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[1] 15 U.S.C. § 45(b) (1964).

[2] F.T.C. Procedures and Rules of Practice, 16 C.F.R. § 2.31-.34 (1970).

[3] *Id.* § 2.33.

[4] *E.g.*, orders must have a reasonable relationship to the unfair practices found to exist, F.T.C. v. National Lead Co., 352 U.S. 419 (1957).

[5] Standard Oil Company of California, 3 TRADE REG. REP. ¶ 19,352 (FTC 1970).

cease and desist from use of the allegedly misleading F-310 claims, would require it to disclose in *all* gasoline advertisements, for the period of one year, that former advertising for its gasoline had contained false, misleading and deceptive statements, representations and demonstrations. The Commission would require that not less than twenty-five percent of the space or exposure time devoted to each subsequent advertisement be used for the purpose of making the affirmative discolsure.[6] The other case involves the Coca-Cola Company's advertising for Hi-C fruit drinks,[7] where similar affirmative disclosure requirements are proposed by the Commission. The proposed cease and desist order would bar Coca-Cola from making nutrient claims for any of its products unless it disclosed that the Hi-C advertising had been questioned by the Commission.

II. NATURE AND HISTORY OF CEASE AND DESIST ORDERS

A review of the nature and history of Federal Trade Commission cease and desist orders will help delineate the difficulties with the two proposed orders. Federal Trade Commission orders are basically injunctive in effect and prohibitory in nature. They are intended to be regulatory and not punitive.[8] Thus no penal provisions or punitive sanctions are imposed because of the unfair or deceptive practice which gave rise to the cease and desist order. Civil penalty provisions which permit recovery, on suit by the United States Attorney, of penalties of up to $5000 for each violation of a cease and desist order come into play only if an order which has become final is itself violated.[9] The civil penalties are imposed only for violation of the order, and the proceedings leading to imposition of such penalties are separate and distinct from those which resulted in issuance of the original cease and desist order.[10]

The Federal Trade Commission Act provides only for the issuance of cease and desist orders for the purpose of preventing continued violations of the Act.[11] Therefore, the orders look to

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[6] *In re* Standard Oil Co. of California, No. 8827 (FTC, Dec. 29, 1970).

[7] Coca-Cola Company, 3 TRADE REG. REP. ¶ 19,351 (FTC 1970). The order in *Standard* appears somewhat broader than the order in *Coca-Cola*. The latter would apply the affirmative disclosure requirement only to subsequent advertising which made claims to nutrient ingredients. The *Standard* order would require affirmative disclosure in *all* subsequent advertising of gasoline.

[8] United Corporation v. F.T.C., 110 F.2d 473 (4th Cir. 1940).

[9] 15 U.S.C. § 45(l) (1964).

[10] Drath v. F.T.C., 239 F.2d 452 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 917 (1957).

[11] 15 U.S.C. § 45(b) (1964).

the future and are not applied retroactively.[12] Generally they do not require the respondent to undertake affirmative action.[13] Since the Federal Trade Commission Act is not one of those statutes designated as "antitrust laws" by section 1 of the Clayton Act,[14] there is no statutory basis for private suit for damages against violators of the Federal Trade Commission Act, and the courts have consistently refused to permit private suits to be brought for the purpose of remedying individual rights which may have been impaired because of practices which violate the Federal Trade Commission Act.[15]

In the *Ruberoid* case[16] the Supreme Court enunciated broad guidelines for the scope of Federal Trade Commission orders: (1) orders are not intended to impose criminal punishment or exact compensatory damages; (2) orders are intended to prevent illegal practices in the future; (3) orders need not be limited to the precise form of an established illegal practice; (4) orders may be framed so as to be broad enough to prevent easy circumvention by the party against whom they are issued; (5) the Commission has broad discretion in its choice of remedy; and (6) the remedy selected must have some reasonable relation to the unlawful practices found to exist. The *Ruberoid* order imposed negative inhibitions and the Court, consequently, did not have the occasion to apply its guidelines to an order which required affirmative disclosures on the part of the respondent.

A. Affirmative Disclosure Cases

Such an affirmative order was, however, involved in *Alberty* v.

[12] Niresk Industries, Inc. v. F.T.C., 278 F.2d 337 (7th Cir.), *cert. denied,* 364 U.S. 883 (1960). "Commission orders are not designed to punish for past transgressions, but are designed as a means for preventing 'illegal practices in the future.' " *Id.* at 343, *quoting* F.T.C. v. Ruberoid Co., 343 U.S. 470, 473 (1952).

[13] *See* Curtis Publishing Co., 3 TRADE REG. REP. ¶ 19,376 (FTC 1970). In a proceeding against the publishing company the complaint charged the Federal Trade Commission Act was violated because cash refunds were not offered to subscribers of the defunct magazine, *Saturday Evening Post.* The hearing examiner ruled that a proposed order requiring payment of refunds was beyond the scope of the Commission's order making power.

[14] 15 U.S.C. § 12 (1964). Section 1 of the Clayton Act defines "antitrust laws" to include the Sherman Act, 26 Stat. 209 (1890); *as amended,* 15 U.S.C. §§ 1-7 (1964); the Wilson Tariff Act's antitrust amendments, 28 Stat. 570 (1894), *as amended,* 15 U.S.C. §§ 8-11 (1964); the amendments to the Wilson Tariff Act's antitrust amendments, 37 Stat. 667 (1913), 15 U.S.C. §§ 8-11 (1964); and the Clayton Act itself. Section 4 of the Act, 15 U.S.C. § 15 (1964), permits suits for treble damages by any person who may be injured in his business or property by reason of an antitrust law violation

[15] Carlson v. Coca-Cola Co., 318 F.Supp. 785 (N.D. Cal. 1970). *But see* Kardon v. National Gypsum Co., 73 F. Supp. 798, (E.D. Pa.), *modified,* 83 F. Supp. 613 (1947), allowing stockholder suits to recover damages resulting from violation of the Securities and Exchange Act of 1934. *See also* Ruder, *Challenging Corporate Action Under Rule 10b-5,* 25 BUS. LAWYER 75 (1969).

[16] F.T.C. v. Ruberoid Co., 343 U.S. 470 (1952).

Federal Trade Commission.[17] In *Alberty* the respondent was a seller of various proprietary drug products including a blood tonic called Oxorin which Alberty claimed to be effective in relieving that "weary, tired, run-down" feeling. The Commission found the advertising for this product to be false and misleading. It issued an order requiring Alberty to cease and desist from representing that Oxorin "will have any therapeutic effect upon the blood or red corpuscles thereof, except in the case of simple iron deficiency anemia . . . ."[18]

In addition to the above negative prohibition the order required subsequent advertising for Oxorin to include an affirmative disclosure "that the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it." In effect, the respondent was required to disclose that his product would not be effective, in most cases, to relieve the symptoms for which it was advertised.

On review by the court of appeals the issue was whether the Federal Trade Commission had authority to issue an order requiring affirmative disclosures by a respondent. The court modified the Commission's order by deleting the affirmative disclosure requirement.[19] The position of the two judges who agreed on the majority opinion was that the Commission's orders were intended by Congress to be primarily negative in function. The Commission had power to require that a product be truthfully represented but not power to require affirmative disclosures unless they were needed to provide instructions or explanations or to warn against dangers incident to use of the product.

The dissenting judge pointed out that the Federal Trade Commission was created by Congress to become a body of experts in a complex society. In his view,

> the action taken by the majority overlooks the fact that Congress, by enacting legislation proscribing false and deceptive advertising, sought to remedy the consumer's patent inability to ascertain the merit of claims made by advertisers. The Act's purpose is to encourage the informative function of

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[17] 44 F.T.C. 475 (1948), 182 F.2d 36 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 818 (1950).

[18] 182 F.2d at 37.

[19] 182 F.2d 36 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 818 (1950). Affirmative disclosures required to comply with statutory provisions of various labeling and information statutes which are administered by the Commission are not within the scope of this paper. *See* Wool Products Labeling Act, 15 U.S.C. § 68 (1964); Fur Products Labeling Act, 15 U.S.C. § 69 (1964); Textile Fiber Products Identification Act, 15 U.S.C. § 70 (1964).

> advertising; and the Commission's duty is to eliminate falsehoods.[20]

The apparent setback for affirmative disclosure orders which the Commission suffered in *Alberty* was soon overcome. Later cases did not interpret *Alberty* as a challenge to the Commission's authority to issue cease and desist orders.[21] These decisions interpreted *Alberty* to mean merely that the Commission had not properly exercised its authority in that case by reason of its failure to find that the public would not be adequately protected from the respondent's deceptive advertising unless certain affirmative disclosures were made.

In *Keele Hair & Scalp Specialists, Inc.* v. *Federal Trade Commission,*[22] where the respondent advertised a hair growing remedy, it was represented that baldness was unnecessary, that hopeless cases of baldness were rare, and that ninety-five percent of all baldness cases could be treated by the Keele method. The Commission made findings, based on substantial evidence, that approximately ninety-five percent of baldness in the case of men (to whom the Keele advertising was primarily directed) resulted from male pattern baldness for which there was, unfortunately, no known remedy. The *Keele* court stated:

> There is nothing in the Alberty case that prevents enforcement of a cease and desist order requiring affirmative disclosure. The Alberty case simply held that the Commission must make certain findings before compelling affirmative disclosure. In the instant case the Commission made the required findings and on the basis of these findings issued its order requiring that petitioners disclose affirmatively that Keele preparation would not be effective against male pattern baldness. Failure to disclose that approximately 95 percent of the cases of baldness fall within the male pattern type is plainly misleading, when the petitioners claim they treat effectively virtually all cases of baldness.[23]

In the *J.B. Williams* case,[24] the advertised product was Geritol, a blood tonic represented to be of benefit in the treatment of some of the same symptoms described in *Alberty, i.e.,* "tired run down feeling," "iron poor blood" and the like. Here the court affirmed the Federal Trade Commission's affirmative disclosure order,

[20] 182 F.2d at 45.
[21] Keele Hair & Scalp Specialists, Inc. v. F.T.C., 275 F.2d 18 (5th Cir. 1960); Ward Laboratories, Inc. v. F.T.C., 276 F.2d 952 (2d Cir. 1960); J.B. Williams Co. v. F.T.C., 381 F.2d 884 (6th Cir. 1967).
[22] 275 F.2d 18 (5th Cir. 1960).
[23] *Id.* at 23.
[24] J.B. Williams Co. v. F.T.C., 381 F.2d 884 (6th Cir. 1967).

again supported by adequate findings that the great majority of persons suffering from the described symptoms would not be benefited by taking Geritol. Moreover, this finding was considered by the court to be a "material fact" within the meaning of section 15 of the Federal Trade Commission Act.[25] Therefore, the requirement in the order of an affirmative disclosure that the great majority of persons who suffer from tiredness, run down feelings, etc. would not be helped by taking Geritol was held to be appropriate.

B. Characteristic Types of Affirmative Disclosures

Since *Alberty,* affirmative disclosure requirements within the guidelines set out by the courts have been used in many situations. Several orders have been issued in foreign origin cases involving products made wholly or substantially in a foreign country.[26] The Commission has required disclosure of the source either by marking the product, its package or container, or by other appropriate means. The disclosure has been required in those cases where the Commission has found that a substantial number of the persons who might purchase the foreign product have a preference for products of domestic origin. Such preference might influence their choice of purchase and it would be misleading if they were not informed of the foreign origin before making a selection. Therefore, it was felt that an affirmative disclosure of the foreign origin was needed to prevent deception.

Another line of cases has involved used, rebuilt or reprocessed products which are offered in such a manner that the purchaser may assume they are new.[27] In the used oil cases where crank case drainings and other used oil was "re-refined" and sold to motorists, it was held that an affirmative disclosure that the product was derived from used oil could be required on the containers in which the oil was offered to the consumer. Even though there was evidence that the "re-refined" oil was equivalent in quality to virgin crude oil, a finding by the Commission that a substantial number of the purchasing public preferred to purchase new oil and would believe respondent's oil was made from virgin crude unless otherwise informed, established the likelihood of deception.

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[25] 15 U.S.C. § 55(a)(1) (1964).

[26] *E.g.,* L. Heller & Son, Inc. v. F.T.C., 191 F.2d 954 (7th Cir. 1951); American Tack Co. v. F.T.C., 211 F.2d 239 (2d Cir. 1954).

[27] Kerran v. F.T.C., 265 F.2d 246 (10th Cir. 1959); Mohawk Refining Corp. v. F.T.C., 263 F.2d 818 (3d Cir.), *cert. denied,* 361 U.S. 814 (1959); Royal Oil Corp. v. F.T.C., 262 F.2d 741 (4th Cir. 1959).

The purchaser was entitled to know the facts regarding the source of respondent's oil and entitled to base his choice thereon.[28]

Affirmative disclosure that the product has been rebuilt or reconstituted from previously used components has also been required where television picture tubes have been rebuilt with new electronic parts but reused glass envelopes obtained from old picture tubes;[29] where automotive replacement parts have been rebuilt from formerly used parts;[30] and where used goose feathers have been incorporated into feather and down products which are sold as new.[31]

Another line of affirmative disclosure cases has involved synthetic materials which simulate or closely resemble precious metals. Here the purchaser is entitled to know what he is really buying. If a plastic material closely resembles leather, and leather historically has been the commonly accepted component of certain consumer items, the Commission has appropriately required that affirmative disclosure be made of the non-leather parts.[32] Analogously, where a base metal resembles a precious metal, affirmative disclosure that the product is in fact composed wholly or partially of base metal has been required.[33]

Still another line of cases has involved products which may have latent danger potential for the individual user,[34] for the mechanisms with which they are used,[35] or for the environment.[36] In such cases the Commission is well within the court established guidelines when it requires the seller to make an affirmative disclosure of the product's dangerous potentialities along with his advertisement of the benefits which it may provide. Such a disclosure is needed to protect the user if he would expect the product to be safe under normal use conditions. The disclosure also provides him with information which might be influential in causing him to purchase or not to purchase a product.

Another practice, which is frequently employed in credit sales

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[28] Cases cited note 27 *supra.*

[29] Liberty Electronics, Inc., 58 F.T.C. 491 (1961); Mercury Tube Corp., 58 F.T.C. 464 (1961); American Standard Television Tube Corp., 58 F.T.C. 224 (1961).

[30] Lee Electric Co., 60 F.T.C. 491 (1962); Sidney Lenet Doing Business As M. & M. Spring Co., 50 F.T.C. 207 (1953).

[31] Purofied Down Products Corp., 48 F.T.C. 155 (1951).

[32] Trade Practice Rules, Luggage and Related Products Industry, 16 C.F.R. § 154 (1962).

[33] Guides for the Watch Industry, 16 C.F.R. Pt. 245 (1968).

[34] Aronberg v. Federal Trade Commission, 132 F.2d 165 (7th Cir. 1942); Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising & Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 16 C.F.R. § 408 (1964).

[35] E.I. du Pont de Nemours & Co., 3 TRADE REG. REP. ¶ 19,395 (FTC 1970).

[36] Labeling and Advertising Requirements for Detergents (proposed Trade Regulation Rule) 1971 BNA ANTITRUST & TRADE REGULATION REPORT NO. 497, at G-1.

of home improvements to consumers, is assignment of the consumer's note or other instrument of indebtedness to a third party so as to cut off defenses on the contract which might be available against the original seller. Such practices have been the subject of affirmative disclosure requirements.[37] The disclosure order was supported by findings that a substantial number of purchasers believed the original seller would not transfer their instruments of indebtedness to third parties. Had they known of the intended transfer, they might not have agreed to purchase the home improvements on credit.

Prior to enactment of the Civil Rights Act of 1968,[38] the Federal Trade Commission entered new frontiers when it issued complaints against several operators of rental apartments located in the State of Virginia. The complaints alleged that advertising for the apartments was misleading because it represented that they were available to the general public whereas, in fact, they were not available to black applicants.[39] The proposed cease and desist order would have required the respondents to cease placing any advertisements which tended to convey the false impression that apartments would be rented to the general public without restriction because of race, color or national origin.[40] Presumably, advertising would be in compliance only if there were either a removal of the restrictions or an affirmative disclosure that they existed.

The Commission rejected a hearing examiner's dismissal of the complaints on grounds they were rendered moot by subsequent enactment of the fair housing provisions of the Civil Rights Act of 1968,[41] but itself dismissed the complaints on the different ground that unqualified assurances of discontinuance of the challenged practices had been given by each of the respondents.[42] By its dismissal the Commission avoided testing its jurisdiction and the scope of affirmative disclosure orders in the cases in question.

In all of the cases considered thus far, the Commission has made findings or could have made findings which would bring its affirmative disclosure orders within the scope of the broad guidelines for cease and desist orders laid down by the Supreme Court

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[37] All-State Industries of North Carolina, Inc. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,740 (FTC 1969), *aff'd,* All-State Industries of N.C., Inc. v. F.T.C. 423 F.2d 423 (4th Cir. 1970); *see also* Negotiable Instruments—F.T.C. Policy, 5 TRADE REG. REP. ¶ 50,257 (FTC 1969).

[38] 42 U.S.C. § 3601 (Supp. V, 1968).

[39] First Buckingham Community, Inc. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,122 (FTC 1967).

[40] *Id.*

[41] 42 U.S.C. § 3601, *as amended,* (Supp. V, 1965-1969).

[42] [1967-1970 Transfer Binder] TRADE REG. REP. ¶¶ 18,357, 18,662 (FTC 1968).

in *Ruberoid*.[43] The scope of the orders has been to prevent statements in advertising from being deceptive and misleading or to warn against possible consequences which might result from use of the product. The orders have been prospective in nature and non-punitive in effect.

III. THE SOUP ORDERS

In the context of these prior uses of affirmative disclosure, the proposed affirmative disclosure orders in the *Standard Oil* and *Coca-Cola* cases are more clearly brought into focus. In these cases the Commission is attempting to use affirmative disclosure in a sharply divergent manner from that in the past. The orders proposed in *Standard* and *Coca-Cola* are sometimes referred to as "SOUP" type orders. The name is one adopted by a group of law students who organized themselves under the name Students Opposed to Unfair Practices (SOUP),[44] and challenged the manner in which the Federal Trade Commission was handling proceedings against certain advertising of the Campbell Soup Company.

In the *Campbell* case,[45] a proposed consent order prohibited the respondent from using advertising which falsely represented its soup or other food products. One of the advertising representations to which the Commission objected was a television commercial which pictured a bowl of soup into which Campbell had inserted a handful of marbles for the purpose of forcing the solid ingredients to the top and making them more visible to the television viewer. The Campbell Company consented to issuance of the order and the Commission provisionally accepted it.[46] In accordance with the Federal Trade Commission procedures, the proposed order was placed on the public record for thirty days to permit comment by interested parties.[47]

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[43] F.T.C. v. Ruberoid Co., 343 U.S. 470 (1952). *See* text accompanying note 16 *supra*.

[44] Wall St. Jour., Feb. 5, 1970, at 1, col. 4. The name may derive from the case in which the students chose to involve themselves or may be a throwback to the "Alphabet Soup" days of the Franklin Roosevelt presidency. In that era the proliferation of new governmental agencies referred to by initials coined the Alphabetical Soup title. *Compare* "Operation Truth," the program suggested by former Commissioner Philip Elman, 1970 BNA ANTITRUST & TRADE REGULATION REPORT NO. 488 at A-1. This program is designed to relieve manpower shortages at the F.T.C. by enlisting law students to monitor advertising media. Potentially unfair advertising could be reported to the Commission or class actions could be initiated.

[45] Campbell Soup Company, [1967-1970 Transfer Binder] 3 TRADE REG. REP. ¶ 19,261 (FTC 1970). *See also* F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374 (1965).

[46] Campbell Soup Company, [1967-1970 Transfer Binder] 3 TRADE REG. REP. ¶ 19,261 (FTC 1970).

[47] F.T.C. Procedures and Rules of Practice, 16 C.F.R. § 2.34(b) (1970).

Within the period allowed for comment, the SOUP law student group filed a motion to intervene. Although SOUP did not indicate any disagreement with the prohibitory terms of the cease and desist order, they contended that an affirmative disclosure provision should have been added which would require the respondent to disclose in its subsequent advertising that a prior advertisement had been challenged by the Commission as deceptive.

The motion to intervene was denied.[48] The Commission denial rested on several grounds: (1) the order was substantially similar to the one upheld by the Supreme Court in the leading television mock up case, *Federal Trade Commission* v. *Colgate Palmolive Co.*;[49] (2) any violations of the order would be subject to civil penalty sanctions;[50] (3) the principal objective of the Commission's orders should be to stop the deception itself; and (4) acceptance of the proposed order as it stood would be in the public interest. In addition, the Commission felt it could not afford to devote more of its resources to protracted consideration of the *Campbell* case. The deceptive advertising had been discontinued and the agency's resources could be better used elsewhere. This need to make the most effective use of its available resources was said by the Commission to be the principal reason for denying the petition to intervene.

Nevertheless, the Federal Trade Commission did not explicitly reject SOUP's affirmative disclosure idea. In fact, it was not long before the Commission decided, of its own violition, to utilize the SOUP type order in the *Standard Oil* and *Coca-Cola* cases. As previously indicated, the nature of these orders is to require both companies to acknowledge in future advertising that their prior statements were false, misleading and deceptive. It now seems clear that at least the *Standard* case is likely to be tested in the courts. The Commission has already issued its complaint and Standard Oil Company of California has advertised extensively that it has full confidence in its additive and plans to continue to advertise and market it.[51]

IV. THE STANDARD ORDER

Standard can certainly allege that the affirmative disclosure

[48] Campbell Soup Company. [1967-1970 Transfer Binder] 3 TRADE REG. REP. ¶ 19,261 (FTC 1970).
[49] F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374 (1965).
[50] 15 U.S.C. § 45(l) (1964).
[51] Wall St. Jour., Oct. 7, 1970, at 20 & 21 (double page advertisement).

requirement of the proposed cease and desist order is without precedent. Unlike former orders, the proposed affirmative disclosure is not designed to prevent misleading the public in regard to a present advertising claim. Standard would not merely be required to make appropriate explanatory disclosures which would eliminate deception in a concurrent advertising claim. Rather, the proposed order would both prohibit Standard from claiming that F-310 is a valuable anti-pollutant, and require the company to publicly acknowledge that prior commercials stating F-310 would reduce the amount of unburned hydrocarbons were false, misleading and deceptive, and now subject to a Federal Trade Commission cease and desist order.

Since the proposed order is different, requiring publication of prior wrongs and purely prospective in effect, it may run afoul of the tests established by the courts for determining the propriety of an affirmative disclosure order. One of the tests is that the Commission must find that the affirmative disclosure is necessary to free the Standard advertising from deception.[52] If the subsequent advertising does not make any deceptive claims, the Commission would presumably be unable to make such findings. At the time the proposed order is issued the Commission obviously has no means of knowing what claims will be made in future advertising.

There is no apparent reason to believe that the purported misrepresentation of the qualities of F-310 is more grievous than that employed in other affirmative disclosure cases, especially since affirmative disclosure requirements are usually reserved only for circumstances where the respondent has been guilty of flagrant abuses.[53] Since the prior cases of flagrant abuse have not required orders which force disclosure of the past misrepresentations in all subsequent advertising, it would seem appropriate for the court to at least require that the Commission establish why the more onerous order is necessary in this case. Moreover, the insistence of the Commission on the necessity of the affirmative disclosure may be offset by the fact that the sub-

[52] F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374 (1965).

[53] *See* United Association of Credit Bureaus, Inc. v. F.T.C., 299 F.2d 220 (7th Cir. 1962). The court, holding an affirmative order involving disclosure of the purpose of a debt collection form to be arbitrary, stated that "[a]n affirmative disclosure order usually is reserved for circumstances when the respondent has been guilty of flagrant abuses." *Id.* at 223. Unless the challenged advertising itself constitutes "flagrant abuse" neither Coca-Cola Co. nor Standard Oil Co. of California have the record of frequent violators. One former proceeding against Standard involving violation of section 5 of the F.T.C. Act and section 2 of the Clayton Act resulted in a cease and desist order, Atlas Supply Co., 48 F.T.C. 53 (1951). A complaint against Coca-Cola was dismissed, 2 F.T.C. 461 (1919). Currently pending are proposed complaints against Coca-Cola involving games of chance, Coca-Cola Co., 3 TRADE REG. REP. ¶ 19,290 (FTC 1970) and exclusive territories, Crush International Ltd., 3 TRADE REG. REP. ¶ 19,443 (FTC 1971).

sequent advertising will be forbidden to assert the anti-pollutant value of F-310, and also because the dispute over Standard's advertising is already getting significant public exposure through news coverage of the complaint. In any event, should the Federal Trade Commission be able to establish a need for the proposed affirmative disclosure, the terms of the order, to be consistent with the historical context, should be drafted so as not to penalize but merely to correct the misconception. In this context, it seems especially unclear why the specific provision of twenty-five percent of all advertising space for one year is necessary to free Standard from its prior deception. Surely where the case involves new legal approaches and requirements, a court should not accept the Commission's determination of the degree of necessity simply because it is the conclusion of an administrative agency.

A second test applied by the courts in reviewing proposed orders is whether the scope of the order is reasonably related to the offense.[54] In *Standard* the affirmative disclosure would appear in subsequent, separate advertising copy which might make claims having no relationship to those made in the condemned advertising. The disclosure might very well do nothing whatsoever to clarify or explain consequences of either the original or the subsequent advertising.

The guidelines laid down by the courts provide that the order cannot be punitive. The Federal Trade Commission is vested with regulatory powers to issue orders designed to prevent deceptive practices from recurring in the future and not, like the *Standard* order, to punish for past transgressions.[55] The Commission itself has recognized and fostered its mission to provide non-punitive guidance and advice to industry and the public by adopting and administering its Industry Guidance program.[56] The SOUP type orders appear vulnerable to a charge that they are punitive rather than regulatory in nature. In the past, public announcement of complaints and orders has provided the public with information regarding practices which have been challenged or prohibited.[57]

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[54] F.T.C. v. National Lead Co., 352 U.S. 419 (1957).

[55] Niresk Industries, Inc. v. F.T.C., 278 F.2d 337 (7th Cir.), *cert. denied*, 364 U.S. 993 (1960); Erickson v. F.T.C., 272 F.2d 318 (7th Cir. 1959), *cert. denied*, 362 U.S. 940 (1960).

[56] F.T.C. Procedures and Rules of Practice, 16 C.F.R. ¶ 1.1, Subpt. A. (1970):

> Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. It is the Commission's policy to consider requests for such advice and, where practicable, to inform the requesting party of the Commission's views.

[57] *See* F.T.C. v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968), where F.T.C. authority to issue press releases is considered.

Here, Standard is told to use its purchased advertising space to apprise the public of past misrepresentations. Not only do SOUP orders in and of themselves appear to be punitive, but the requirement that twenty-five percent of all advertising space for one year be devoted to acknowledging the misrepresentation, regardless of whether F-310 is mentioned in the advertising, is so excessive that punishment rather than information appears to be the intent of the Commission. If the Commission actually believes the disclosure is needed to prevent deception, the disclosure should be required for the life of the cease and desist order, not merely for one year.

Aside from the tests set forth in the guidelines, a factor of major importance is whether the affirmative disclosure requirement will deter future violations or prevent easy circumvention of the Commission's orders.[58] If punitive sanctions are, in fact, permissible in Federal Trade Commission orders, there may be enough stigma attached to the affirmative disclosure requirement to cause the advertiser to be more careful in making future product claims. Yet, where the orders evoke greater care by tending to punishment, they depart from the role intended for the Federal Trade Commission, which is to halt misinformation and not to impose punitive sanctions on offenders. Where an advertiser sincerely believes that his advertising claims are true and has documented them with experiments and tests as Standard claims to have done,[59] punishment seems to be a particularly inappropriate remedy. The threat of an onerous cease and desist order should not be allowed to cause an advertiser to suppress public announcement of new technological advances which he honestly believes he has achieved.

Finally, there are several potential adverse results which might derive from acceptance of the proposed order. In the first place one cannot be assured that the availability of additional copy or exposure space will mean that advertising will be more informative. On the other hand it does appear likely that reduction in the amount of available copy or exposure space will reduce the extent to which advertising *might* be informative. It may be questioned whether the requirement, that twenty-five percent of Standards future advertising space be devoted to reminding the reader or viewer of an already issued cease and desist order, will add to the informative potentialities of future advertising. Second, and perhaps more important, the likely impact of such oppressive

[58] F.T.C. v. Ruberoid Co., 343 U.S. 470 (1952). *See* text accompanying note 17 *supra*.
[59] *See* note 51 *supra*.

orders will be a drastic reduction in the amount of advertising by the offender during the period covered by the order. This would seem to be particularly true in the case of major producers of well known products. They may feel it is preferable to rely on their established reputation and to diminish or discontinue advertising during the period for which the affirmative disclosure is required. Discouraging any information at all is incompatible with the Federal Trade Commission's purpose of ensuring the accuracy of information.

The Federal Trade Commission has been sharply criticized by appointed[60] and self-appointed[61] critics who have questioned its effectiveness and even its right to continue to exist. The Commission's proposed use of more onerous affirmative disclosure orders may be an over-reaction to such criticism. By taking drastic and unprecedented action in ordinary false and misleading advertising cases, the Commission may appease some of its critics. In so doing, however, it may be departing from its duty to use its available resources in the most efficient and expeditious manner for the purpose of protecting the public from deception.

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[60] ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).

[61] "Nader's Raiders" report: *The Consumer and the Federal Trade Commission—A Critique of the Consumer Protection Record of the FCC*, reprinted in 115 CONG. REC. 1539 (1969).