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I. INTRODUCTION

The Federal Trade Commission (FTC) has regulated competitive business activities since its inception in 1915.[1] Section 5 of the Federal Trade Commission Act (FTCA) empowers the Commission to enjoin certain unfair and deceptive business practices.[2] As is the

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1. Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1982)).

2. As originally written, section 5 stated: "That unfair methods of competition in commerce are hereby declared unlawful." FTCA, ch. 311, § 5, 38 Stat. 719. This provision was subsequently interpreted by the United States Supreme Court to mean that only competitive practices that affected other businesses could be challenged under the statute. *See* FTC v. Raladam Co., 283 U.S. 643, 649 (1931). In 1934, the court recognized that unfair methods of competition could harm consumers. *See* FTC v. R.F. Keppel & Bro., 291 U.S. 304 (1934). The Court in *Keppel* was particularly troubled by the company's advertising campaign because it exploited children. *Id.* at 313. The Court said that the unfair methods phrase was subject to re-interpretation: "It is unnecessary to attempt a comprehensive definition of the unfair methods which are banned, even if it were possible to do so . . . . New or different practices must be considered as they arise in the light of the circumstances in which they are employed." *Id.* at 314.

The FTC's regulatory authority was expanded with the passage of the Wheeler-Lea Act in 1938. Section 5 of the FTCA was amended to include those business activities which only had an impact on the consumers: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." Wheeler-Lea Act, ch. 49, § 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. Section 45). Senator Wheeler, co-sponsor of the Act, summarized the purposes of the proposed amendment:

> Section 5 of the present act is amended, first, by making unlawful "unfair or deceptive acts or practices in commerce." The present act makes unlawful "unfair methods of competition," and the Supreme Court has held that the Commission loses jurisdiction of a case where an actual or potential competitor is not involved. This amendment makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor . . . .
>
> [T]his legislation is designed to give the Federal Trade Commission jurisdiction over unfair acts and practices for consumer protection to the same extent that it now has jurisdiction over unfair methods of competition for the protection of competitors.

83 CONG. REC. 3255-56 (1938).

The Wheeler-Lea Act had been prompted by a series of cases which had narrowly construed the "unfair methods of competition" provision of the 1914 FTCA. In *Raladam*, the

case with other regulatory statutes,[3] Congress chose not to define certain terms in the FTCA, such as "deceptive,"[4] leaving this task to the FTC and the federal courts.[5] The result has been a steady

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United States Supreme Court stated that it would not overstep what it perceived to be the legislative prerogative:

> [T]he word "competition" imports the existence of present or potential competitors . . . the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured. . . . If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.

Raladam, 283 U.S. at 649.

Also, in *Pan Am. World Airways v. U.S.*, 371 U.S. 296 (1963), the Supreme Court recognized that the standard for what constitutes an unfair method of competition or unlawful practice must be determined on a case-by-case basis." *Id.* at 307-08. The Court noted that "[t]he committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition." *Id.* at 306-07, citing S. REP. No. 597, 63d Cong. 2d Sess. 13 (1914).

3. The Securities Act of 1933 does not specifically define a "security," but rather provides a list of transactions as examples. *See* § 2(1), 15 U.S.C. § 77b(1) (1982). Similarly, the Securities and Exchange Act of 1934 contains a list of transactions virtually identical to the 1933 Act, and does not specifically define "security." *See* § 3(a)(10), 15 U.S.C. § 78(a)(10) (1982); *see also* S.E.C. v. W. J. Howey Co., 328 U.S. 293, 299 (1946) ("[the definition of a security] embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."); United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 847-48 (1975) ("[Congress] sought to define 'the term *security* in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security,' " (*quoting* H.R. REP. No. 85, 73d Cong., 1st Sess., 11 (1933))); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) ("[I]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality.").

4. Although some statutory definitions are provided in FTCA section 55, they have been held inapplicable to any action commenced under section 45. *See, e.g.*, Fresh Grown Preserve Corp. v. FTC, 125 F.2d 917 (2d Cir. 1942); *see also* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) ("[T]he proscriptions in Section 5 are flexible, 'to be defined with particularity by the myriad of cases from the field of business.' (quoting, FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394 (1953))).

5. [The FTCA] necessarily gives the Commission an influential role in interpreting Section 5 and in applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a Section 5 violation in this field rests so heavily on inference and pragmatic judgment.

FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (footnotes omitted); *see also* FTC v. National Lead, 352 U.S. 419, 428 (1957); Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946); Simeon Management Corp. v. FTC, 579 F.2d 1137, 1145 (9th Cir. 1978); Fedders

flow of federal case law clarifying the definition of a deceptive business act or practice.[6]

James C. Miller, III, the former Chairman of the FTC,[7] was instrumental in the abandonment of the FTC's traditional definition of "deception." Testifying before Congress in 1982, Miller stated:

> There are specific problems with the Commission's definition of deception. First, the definition is not clear, despite its 44 year history. The courts tend to give the Commission very wide latitude, and the Commission's own case law is not clear and consistent. As a result, businesses do not know what they can and cannot do. Consumers do not know what protections they do and do not have. The Commission really does not know what cases to bring and what not to bring, and the courts do not know which Commission decisions to affirm and which to reverse. As a result, they tend to defer to the agency.[8]

Miller strenuously advocated that a deceptive act be defined as a "material representation that is likely to *mislead consumers, acting reasonably in the circumstances* to their detriment."[9] The courts defined deception according to whether an act or practice had the "tendency or capacity" to deceive. The minority commissioners charged Miller with deliberately attempting to subvert this pro-consumer position.[10]

Chairman Miller actively lobbied Congress to amend section 5 of

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Corp. v. FTC, 529 F.2d 1398, 1402 (2d Cir. 1976); Firestone Tire & Rubber Co., 481 F.2d 246, 248 (6th Cir. 1973).

The courts have recognized the role of other agencies in determining workable definitions for statutorily undefined terms, such as in securities law: "The task has fallen to the Securities and Exchange Commission (SEC), the body charged with administering the Securities Acts, and ultimately to the federal courts to decide which of the myriad financial transactions in our society [constitute a "security" and] come within the coverage of . . . the [1933 and 1934] statutes." *Forman*, 421 U.S. at 848.

6. *See infra* notes 17-36 and accompanying text.

7. James C. Miller, III became Chairman of the Federal Trade Commission on September 30, 1981. Washington Post, Oct. 1, 1987, at A24, col. 1. Miller was later confirmed by the Senate to become Director of Office of Management and Budget. Advertising Age, Oct. 7, 1985, at 8, col. 4. FTC Commissioner Terry Calvani then became acting Chairman. Advertising Age, Oct. 10, 1985, at 3, col. 2.

8. *FTC's Authority over Deceptive Advertising: Hearing Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science & Transp.*, 97th Cong., 2d Sess. 3 (1982) [hereinafter *Deceptive Advertising Hearings*].

9. *Id.* at 4 (emphasis added). Miller added that "a material representation that the representor knew or should have known would be misleading" would also constitute a deceptive act. *Id.*

10. *Id.* at 59-62 (statement of Commissioner Bailey); and 67-71 (statement of Commissioner Pertschuk).

the FTCA to include a definition of "deceptive" trade acts. In October 1983, the Commission majority drafted a Deception Policy Statement in response to a request from the House Committee on Commerce for clarification of the FTC's deception policy.[11] Congress did not respond favorably to this Policy Statement,[12] so in 1984, the Commission majority adopted the reasonable consumer deception standard in the case of *In re Cliffdale Associates*[13] over the objections of the minority commissioners.[14] Since 1984, the FTC has decided four cases[15] relying on the *Cliffdale* holding.

This article will review the development of the existing federal deception standard and focus on the efforts of the Miller Commission to abolish the traditional standard. Additionally, the *Cliffdale* case line will be analyzed in an effort to determine whether a significant change in the burden of proof has been established by virtue of the 1983 Policy Statement.[16]

II. PRE-1982: "TENDENCY OR CAPACITY TO DECEIVE"

The traditional deception standard, is composed of three basic elements: (1) the act or practice must have a tendency or capacity

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11. The Commission had been requested to:

> [P]repare an analysis of its deception jurisprudence as presently applied by the Commission and interpreted in case law. If the Commission adopts this analysis, the Commission shall submit such analysis to the Committee. That analysis should include a decision of whether a need exists to provide a statutory definition of deception, and, if the Commission concludes that such a definition is necessary, the Commission shall provide the Committee with proposed language for such a definition. The Committee is mindful of the fact that the Commissioners have expressed different views on this subject at our hearings and requests that, if appropriate, each Commissioner fully elaborate these individual views for the Committee.

REPORT OF THE ENERGY AND COMMERCE COMMITTEE ON THE FEDERAL TRADE COMMISSION AUTHORIZATION OF 1982, S. REP. No. 97-451, 97th Cong., 2d Sess. 16; H.R. REP. No. 98-156, 98th Cong., 1st Sess., pt.1, 5 (1983). The Commission's Deception Policy Statement is appended to the majority opinion in In re Cliffdale Assocs., 103 F.T.C. 110, 174 (1984).

12. Congress did not adopt the Section 5 amendment that was part of the *Federal Trade Commission Authorization Act of 1983*, H.R. 2970, 98th Cong., 1st Sess. (1983); *see also infra* notes 40-51 and accompanying text.

13. 103 F.T.C. 110 (1984).

14. The majority was comprised of Chairman Miller and Commissioners Douglas and Calvani. Commissioners Bailey and Pertschuk agreed with the result but dissented over the application of a new deception standard. *Id.* at 184, 189.

15. In re Figgie Int'l, Inc., 107 F.T.C. 313 (1986); In re Southwest Sunsites, 105 F.T.C. 7 (1985); In re International Harvester Co., 104 F.T.C. 949 (1984); In re Thompson Medical Co., 104 F.T.C. 648 (1984). For a complete discussion of the FTC's deception policy as applied in these cases, *see infra* notes 123-197 and accompanying text.

16. *See infra* notes 174-76 and accompanying text.

to deceive,[17] (2) the reaction of only the targeted audience must be evaluated,[18] and (3) the act or practice must be material.[19] In evaluating whether the practice had a tendency to deceive, the FTC did not have to find actual deception.[20] The act or practice was reviewed as a whole.[21] If the act or practice had a propensity to

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17. Simeon Management Corp. v. FTC, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978) ("Advertisements having the *capacity to deceive* are deceptive within the meaning of the FTCA . . . .") (emphasis added) (weight loss clinic had promoted drug as being safe and effective against obesity, leading consumers reasonably to believe that the product had received FTC approval); Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977) ("[T]he Commission was entitled to conclude from the advertisements themselves and stipulations of fact that the ads had a *tendency or capacity* to mislead consumers.") (emphasis added); *see also* American Home Prods. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982); Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); Resort Car Rental Sys. v. FTC, 518 F.2d 962, 964 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975); Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921, 925 (6th Cir. 1968); Montgomery Ward & Co. v. FTC, 379 F.2d 667, 670 (7th Cir. 1967); Goodman v. FTC, 244 F.2d 584, 604 (9th Cir. 1957); Kalwajtys v. FTC, 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679-80 (3d Cir. 1944); General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir.), *cert. denied*, 312 U.S. 682 (1940).

18. The Supreme Court has noted that children "constitute an especially vulnerable and susceptible class requiring special protection from business practices that would not be unlawful if they only involved adults." FTC v. R.F. Keppel & Bro., 291 U.S. at 313. The *Keppel* court held that an act or practice that interfered with a child's free choice could be construed as unfair or deceptive even if the act in question was not particularly pernicious to adults. *Id*; *see also* Statement of Basis and Purpose of Trade Regulation Rule: Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8325, 8357-59 (1964) [hereinafter Statement of Basis and Purpose].

19. Although section 5 of the FTCA does not specifically include materiality as part of the unfairness and deception standards, the term is mentioned in the definition of false advertisement:

> 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.

15 U.S.C. § 55(a)(1) (1982) (emphasis added).

20. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965); FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922); *American Home Prods.*, 695 F.2d at 687; Trans World Accounts, Inc. v. FTC, 594 F.2d 212, 214 (9th Cir. 1979); *Resort Car Rental Sys.*, 518 F.2d at 964; *Montgomery Ward & Co.*, 379 F.2d at 670; Feil v. FTC, 285 F.2d 879, 883-84 (9th Cir. 1960); Herzfeld v. FTC, 140 F.2d 207, 208 (2d Cir. 1944); *Charles of the Ritz Distrib. Corp.*, 134 F.2d at 680; Bockenstette v. FTC, 134 F.2d 369, 371 (10th Cir. 1943); Pep Boys - Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 161 (3d Cir. 1941).

21. The Commission's right to scrutinize the visual and aural imagery of advertisements [or any other business act or practice] follows from the principle that *the Commission looks to the impression made by advertisements as a whole.* Without this mode of

deceive, the FTCA was violated.[22]

It was also possible to run afoul of section 5 by failing to disclose all pertinent information. These "omission" cases looked to the impression that was conveyed by the party responsible for the nondisclosure of information.[23] Very often the omitted information was material to an informed consumer choice, and the Commission's position was that absent the additional information, the practice was deceptive per se.[24]

The Commission has been careful not to impose section 5 liability where the representation was mere sales talk or puffing.[25] Con-

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> examination, the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words.

American Home Prods., 695 F.2d at 688 (emphasis added); *see also Feil*, 285 F.2d at 886 n.15.

In some cases, the FTC found deception in a representation that was factually correct: "Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive." *Bockenstette*, 134 F.2d at 371; *see also* Carter Prods. v. FTC, 323 F.2d 523, 528 (5th Cir. 1963); *Rhodes Pharmacal Co.*, 208 F.2d 382, 387 (1953); P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950).

22. The traditional deception standard has not always been phrased in terms of a tendency or capacity to deceive. *See Montgomery Ward*, 379 F.2d at 670 ("[T]he *likelihood of deception* or the capacity to deceive is the criterion by which the advertising is judged.") (emphasis added). 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); *see also Feil*, 285 F.2d at 886 n.15, 896 (court used "tendency to deceive" and "*likelihood to deceive*" interchangeably).

23. In Royal Baking Powder Co. v. FTC, 281 F. 744 (2d Cir. 1922), the company had sold tartar baking powder for over fifty years. The powder was considered unique due to the tartar ingredient. When the manufacturer deleted tartar from the ingredients and substituted the less expensive phosphate, it continued to use packaging, labels, and advertisements stating that tartar was an ingredient in the powder. *Id.* at 747-48. The FTC issued an affirmative disclosure order requiring the company to include the word "phosphate" in the product's name. *Id.* at 753.

When the Commission issues an affirmative disclosure order, the company has two alternatives: 1) include the omitted information in future dealings with consumers, or 2) cease the practice in question. By contrast, the "corrective order" is designed to correct a false impression conveyed by a previous practice which was persuasive to the consuming public. *See generally Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

24. The Commission's power to impose affirmative disclosure orders has been affirmed by the Supreme Court:

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946); *see also* FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952); FTC v. National Lead Co., 352 U.S. 419, 428 (1957).

25. Rachlin v. Libby-Owens-Ford Glass Co., 96 F.2d 597, 599 (2d Cir. 1938) (safety glass

sumers are generally regarded as being capable of protecting themselves from such persuasive efforts. In evaluating sales claims, the FTC determined whether under its interpretation, the puffing fell short of deception.[26]

Akin to puffing are representations that are susceptible to two interpretations, at least one of which is misleading. This type of problem arises most often in advertising cases. The FTC has consistently held that such double entendres constitute deceptive practices in violation of section 5.[27]

In establishing the "audience reaction" requirement, the FTC did not consider the reactions of all those persons within the entire pool of potential victims. Instead, the Commission carved a target audience from this group. The Commission asked whether a "substantial number"[28] of people within the group could possibly have been deceived. This test has been called the "substantial percentage,"[29] "substantial portion,"[30] and "substantial segment test."[31] The FTC has never established an exact number of affected people required in order to find an act deceptive. However, one court went so far as to hold that the deception standard should be expanded

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was advertised as providing the "greatest available protection" to the consumer against injury); *Carlay Co. v. FTC*, 153 F.2d 493, 496 (7th Cir. 1946) (court acknowledged that petitioner's description of his product as "perfect" was "not calculated to deceive"). *But cf.* Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246 (6th Cir. 1973) (manufacturer's claims of a "safe tire" went beyond mere puffing and contained guarantees of absolute safety), *cert. denied*, 414 U.S. 1112 (1973).

26. Former Chairman Miller did not agree with this approach to expressions of opinion. He felt that they should be subject to the reasonable consumer standard. *See Deceptive Advertising Hearings*, *supra* note 8, at 11-12.

27. National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 161 (7th Cir. 1977) (challenging a trade association's claim that there was no scientific evidence linking the consumption of eggs with an increased risk in heart disease), *cert. denied*, 439 U.S. 821 (1978). The FTC's investigation of opinion statements has always focused on the potential for misleading consumers:

> While the courts still make occasional reference to the fact-opinion distinction, they recognize no privilege for statements of opinion in advertising, and invariably regard as a deceptive and unlawful representation any opinion stated in such a manner as to mislead the consumer. The traditionally broad scope of permissible "puffing" has been narrowed to include only expressions that the consumer clearly understands to be pure sales rhetoric on which he should not rely in deciding whether to purchase the seller's product.

Statement of Basis and Purpose, *supra* note 18, at 8351.

28. Bristol-Myers Co. v. FTC, 85 F.T.C. 688, 744 (1975).

29. *See* Benrus Watch Co. v. FTC, 352 F.2d 313, 319-20 (1965).

30. Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961).

31. Statement of Basis and Purpose, *supra* note 18, at 8350.

to protect even "the ignorant, the unthinking and the credulous."[32]

The final element of the traditional deception standard required that the representation or omission be material.[33] Although the FTC has provided no definitive guidance, a representation was considered material if the consumer relied upon it in reaching a decision relative to the product.[34] The United States Supreme Court has stated "the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."[35] Historically, the Commission has not required that a consumer suffer an actual injury in order to satisfy the materiality requirement.[36]

III. 1982-1984: THE COMMISSION'S POLICY STATEMENT ON DECEPTION

Shortly after being named Chairman of the Commission,[37] Mr. Miller sparked controversy with his public statements regarding the FTC's substantiation doctrine.[38] Appearing before the Associa-

32. Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).

33. *See* FTC v. Colgate-Palmolive, 380 U.S. 374, 386-87 (1965). Information may also be material if it relates to the use of a product. *See, e.g., In re* American Motors Corp., 100 F.T.C. 229 (1982) (comparing the maneuverability of jeeps and passenger cars on paved surfaces), *vacated on other grounds*, 105 F.T.C. 194 (1985) (new regulation of National Highway Traffic Safety Administration covered same subject matter as FTC's order); International Harvestor Co., 104 F.T.C. 949 (1984) (information concerning a safety hazard associated with the operation of tractors).

34. *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 165-66 (1984) ("[A] material representation, omission, act or practice involves information that is important to consumers and, hence, *likely to affect their choice of, or conduct regarding, a product.*") (emphasis added). Materiality may, however, be inferred where the Commission has found a false claim. *Colgate-Palmolive Co.*, 380 U.S. at 391-92.

35. FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934).

36. *See* Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (1967); Resort Car Rental Sys. v. FTC, 518 F.2d 962, 964 (1975) (*quoting Algoma*, 291 U.S. at 78; Feil v. FTC, 285 F.2d 879, 896 (1960)). Former Chairman Miller labored to have the injury requirement made an integral part of the reasonable consumer standard, and he incorporated it in the Commission's Policy Statement on Deception. *See, e.g., Cliffdale*, 103 F.T.C. at 183. However, the concept was diluted in *Cliffdale*: "Consumers thus are *likely* to suffer injury from a material misrepresentation. A review of past Commission deception cases shows that one of the factors *usually considered*, either directly or indirectly, is whether or not a claim is material." 103 F.T.C. at 165-66 (footnotes omitted and emphasis added). *See infra* notes 117-22 and accompanying text.

37. *See supra* note 7.

38. The FTC's substantiation doctrine was formalized in In re Pfizer, Inc., 81 F.T.C. 23 (1972). The company had made claims regarding a non-prescription remedy for burns called Un-Burn, stressing its pain-relieving abilities. The company contended that these claims were supported by bona fide scientific tests. *Id.* at 66-68. No such tests had been performed.

tion of National Advertisers, he questioned what amount of substantiation the Commission should require and whether the Commission should mandate any substantiation requirement before the claim is made.[39] These comments indicated that Miller had definite ideas about how the scope of the FTC's section 5 power should be altered with respect to deception.

In 1982, Chairman Miller testified before Congress about the desirability of a statutory definition of deception.[40] He stated that the ad hoc decisionmaking of the Commission in this area had "done consumers more harm than good."[41] The central issue was the traditional deception standard's broad prohibition of acts and practices that "could benefit the majority of consumers," but which had been held deceptive due to a "tendency to mislead an unreasonable few."[42] Miller also accused the agency of pursuing trivial cases, thereby wasting valuable Commission resources.[43] He concluded by recommending that Congress define a deceptive act or practice as a "material misrepresentation that: (a) Is likely to mislead consumers, acting reasonably in the circumstances, to their detriment; or (b) The representor knew or should have known would be misleading."[44]

The full Commission upheld dismissal of Pfizer's appeal, but also held that where a product claim is not supported by a "reasonable basis," it would be considered an unfair and deceptive act violative of the FTCA. *Id.* at 64. The *Pfizer* substantiation doctrine had become an industry standard and experts were understandably concerned about the official policy which would replace it.

39. Advertising Age, Nov. 16, 1981, at 107, col. 1. In addition to seeking support for his efforts to narrow the Commission's authority, Chairman Miller also testified before the Senate Appropriations Committee that the FTC's budget should be cut by over $10 million. *See* Advertising Age, Nov. 2, 1981, at 102, col. 2.

40. *Deceptive Advertising Hearings*, *supra* note 8, at 3.

41. *Id.*

42. *Id.*

43. *Id.* Mr. Miller elaborated:

> The Commission also has challenged alleged deceptive acts and practices that are *not likely to cause consumers any injury*. In these cases, the Commission's scarce enforcement resources have been squandered on the trivial. Examples of this . . . are Commission cases challenging discount pricing claims and claims concerning products that are low in price, are frequently purchased, and are easy to evaluate.

Id. (emphasis added). The injury/detriment requirement was included in this version of the deception standard. *See infra* note 53 and accompanying text.

44. *Deceptive Advertising Hearings*, *supra* note 8, at 8-9. Chairman Miller reiterated his preference that Congress change the deception standards. *Id.* at 20. He also argued that a change in the statutory standard would promote Commission accountability and judicial review:

> A statutory definition will promote accountability . . . because the Commissioners decide for themselves how they want to use their broad discretion. And when the

Congress did not enact a statutory definition as part of FTCA section 5,[45] However, the House Committee on Commerce asked the Commission to prepare a statement detailing its deception enforcement policy.[46] In October 1983, Miller provided a statement which was to become known as the Commission's 1983 Policy Statement on Deception.[47] The Committee rejected the Policy Statement because it failed to meet the Committee's request for a "definitive, neutral analysis" of deception enforcement policy.[48] The Committee viewed the statement as a rehash of the deception

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composition of the Commission changes, so too do the standards.

Moreover, a statutory definition will facilitate judicial review. Courts routinely defer to the decisions of the Commission regarding deception. This is one reason why "the Commission has managed to prevail in the appellate courts in the overwhelming majority of its [deception] decisions that have been appealed." *A statutory definition will provide guidance to the courts by spelling out the standards upon which their review should be based.*

Id. (footnote omitted and emphasis added).

Other organizations offered alternative definitions for a deception standard at the same hearings. The Chamber of Commerce suggested that acts or practices be classified as deceptive which:

(a) consist of material representations known to be false or made in reckless disregard or their truth of falsity, or (b) directly cause or may foreseeably result in substantial economic injury to consumers and such injury is neither reasonably avoidable by consumers themselves nor outweighed by countevailing [sic] benefits to consumers or competition.

Id. at 108 (statement of Bert W. Rein on behalf of the U.S. Chamber of Commerce).

45. Although somewhat different from Chairman Miller's version, the proposed statutory deception definition did retain the "substantial injury" requirement:

(B) An act or practice in or affecting commerce shall be considered to be an unfair act or practice under subparagraph (A) if—

(i) such act or practice causes or is likely to cause substantial injury to consumers; and

(ii) such substantial injury (I) is not reasonably avoidable by consumers; and (II) is not outweighed by countervailing benefits to consumers or to competition which result from such act or practice.

Any determination under the preceding sentence regarding whether an act or practice is an unfair act or practice shall take into account, in addition to other relevant factors, whether such act or practice violates any public policy as established by Federal or State statutes, common law, practices in business or industry, or otherwise. This subparagraph shall not have any force or effect, and shall not be taken into account, in connection with the enforcement of any State law which prevents persons, partnerships, or corporations subject to the jurisdiction or the State from engaging in unfair acts or practices.

H.R. 2970, 98th Cong., 1st Sess. (1983).

46. *See supra* note 11.

47. The Commission's 1983 Policy Statement on Deception can be found at 5 Trade Reg. Rep. (CCH) ¶ 50,455 (Oct. 31, 1983); 45 Antitrust & Trade Reg. Rep. (BNA) No. 1137, at 689 (Oct. 27, 1983); and in an appendix to *In re* Cliffdale Assocs., 103 F.T.C. 110, 174-84 (1984).

48. 5 Trade Reg. Rep. (CCH) ¶ 56,086 (Oct. 31, 1983).

standard that Congress refused to codify.[49] The Committee returned the report to the Commission with instructions to compile a more factual, less argumentative summary.[50] Although Chairman Miller formally responded to the Committee's rejection of the Policy Statement,[51] the Policy Statement's deception definition became the cornerstone of future Commission deception enforcement policies, despite Congressional objections.

The Policy Statement abandoned the language of the traditional deception standard, defining a deceptive act as "a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[52] The Commission recast the materiality requirement of the traditional standard in terms of "consumer injury."[53]

It is imperative to recognize that Chairman Miller believed this new standard to be merely an accurate articulation of the standard which had been established by Commission case law over the previous fifty years. In effect, he saw no change in standards at all.

Miller relied on *Beneficial Corp. v. FTC*[54] to support the new standard's requirement that a representation, omission, or practice be "likely to mislead" the consumer. In *Beneficial*, a finance company advertised that it would provide the consumer with an "Instant Tax Refund" if the individual's tax return entitled her to a refund.[55] Actually, the applicant had to qualify for a loan according to normal company procedures, and there was nothing "instant" about the loan transaction.[56] The Court of Appeals for the Third Circuit upheld the FTC's order, finding the practice decep-

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49. *Id.*
50. *Id.*
51. *Id.* at 56,086-89.
52. *In re* Cliffdale Assocs., 103 F.T.C. 110, 176 (1984).
53. *Id.* at 175-76.
54. 542 F.2d 611 (3d Cir. 1976).
55. *Id.* at 613-14.
56. *Id.* at 617. The court quoted the Commission's conclusion on this point:

> The early Instant Tax Refund advertising is, on its face, totally misleading about the true nature of Beneficial's offer. Instead of making clear that Beneficial is simply offering its everyday loan service, the advertising implies that Beneficial will give a special cash advance to income tax preparation customers with a government refund due, in the amount of their refund. The natural impression, since the Instant Tax Refund is stressed as exclusive and special is that this cash advance is different from a normal consumer loan.

Id.

tive.[57] The court noted that "the FTC has been sustained in finding that advertising is misleading even absent evidence of that actual effect on customers; the *likelihood or propensity of deception* is the criterion by which advertising is measured."[58]

The Policy Statement, however, seems to equate the "likely to deceive" requirement with actual deception. Historically, the Commission has not required actual deception in order to hold a practice deceptive.[59] Furthermore, the Policy Statement emphasizes the court's use of the term "likelihood" in *Beneficial.* However, a complete reading of the opinion reveals that the court viewed "likely to mislead" and "tendency to deceive" as the same standard.[60]

The Policy Statement standard also requires consumers to act reasonably in interpreting seller's representations.[61] The Commission has always focused upon the targeted group's interpretation of the sales practice in question.[62] The Policy Statement also adds that this focus should evaluate the "effect of the practice on a *reasonable* member of that group."[63] Thus, the Policy Statement stresses that the deception standard has not been applied to protect those few people whose misunderstanding of a sales practice is unreasonable. These unfortunate few represent "an insignificant

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57. *Id.* at 621.

58. *Id.* at 617 (emphasis added). The court agreed with that portion of the Commission's order which required the deletion of the phrase "Instant Tax Refunds" from Beneficial Corporation's advertising. *Id.* Interestingly, the FTC modified its cease and desist order in 1986 to permit the company to use the prohibited term in its advertising. The FTC modified its decision because of the IRS' development of 1) an electronic filing system which reduced the turnaround time for refund payments, and 2) new procedures allowing persons who were entitled to refunds to secure interest free bank loans. Beneficial Corp. v. FTC, Dkt. 8922 [1983-1987 Transfer Binder] 3 Trade Reg. Rep. (CCH) ¶ 22,410 (Nov. 3, 1986).

59. *See Beneficial*, 542 F.2d at 617; *see also In re* Cliffdale Assocs., 103 F.T.C. 110, 165 (1984) ("The requirement that an act or practice be 'likely to mislead,' for example, reflects the long established principle that the Commission need not find *actual* deception to hold that a violation of Section 5 has occurred.").

60. In the same paragraph, the court it also referred to the traditional "tendency to deceive" language three times:

> The parties agree that the *tendency* of the advertising *to deceive* must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context . . . . Whether particular advertising has a *tendency to deceive or mislead* is obviously . . . more closely akin to a finding of fact than to a conclusion of law. At the same time, evidence that some customers actually misunderstood the thrust of the message is significant support for the finding of a *tendency to mislead.*

Beneficial, 542 F.2d at 617.

61. *See Cliffdale*, 103 F.T.C. at 177 (Policy Statement).

62. *Id.* at 177-78.

63. *Id.* at 178 (emphasis added).

and unrepresentative segment of the class of persons to whom the representation is addressed."[64]

The "reasonable consumer" standard is based upon the premise that consumers generally are capable of protecting themselves from unscrupulous trade practices. The free enterprise system should therefore be permitted to determine the validity of advertising claims.[65] The Policy Statement makes clear that subjective claims about the taste, feel, appearance and smell of a product fall into the category of conduct which should be market controlled.[66] The Policy Statement also asserts that sellers do not benefit from deceiving consumers where the product can be easily evaluated, is inexpensive, and is frequently purchased. Sellers want repeat purchases and to the extent that they make false claims about the product they will lose repeat purchases. The Policy Statement concludes that the Commission should carefully evaluate such product claims before issuing a formal complaint.[67]

Although the Policy Statement based its reasonable consumer requirement on *In re Kirchner*,[68] its reliance upon that case may

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64. *Id.* (citing *In re* Kirchner, 63 F.T.C. 1282, 1290 (1963)); *In the Deceptive Advertising Hearings*, *supra* note 8, at 10, where Chairman Miller discussed expense of providing accurate information to consumers and the impact that excessive government regulation has on this process. Mr. Miller concluded that "we should be careful not to intervene just because a small minority of consumers acting unreasonably might be misled." *Id.* at 10.

65. According to Chairman Miller:

> [B]y impairing the efficient operation of the advertising market, such over-zealous enforcement might ultimately compound this harm to consumers by reducing competition among sellers of goods and services. The marketplace operates more vigorously and more responsively when consumers are aware of alternative sellers, products and prices. To the extent information concerning these choices becomes more costly to obtain, less information will be produced and disseminated, and consumer awareness about potential choices will be diminished. *The result is a less competitive marketplace, with higher prices and fewer real choices.*

Deceptive Advertising Hearings, *supra* note 8, at 10 (emphasis added).

66. *See* 103 F.T.C. at 181. The Commission also noted that it would not bring an advertising case "on correctly stated opinion claims if consumers understand the source and limitations of the opinion."

67. *Id.*

68. 63 F.T.C. 1282 (1963). The Policy Statement cited the following example to support the argument that existing case law embraces the reasonable consumer requirement:

> 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

be misplaced.[69] The opinion does not directly address the reasonableness requirement, and the cases cited by the *Kirchner* opinion refer to the Commission's policy of concluding that a statement is misleading where two interpretations are possible.[70] The "tendency to deceive" standard included ambiguous representations and construed them in the light least favorable to the vendor.[71] The Policy Statement purported to rely upon the *Kirchner* language in arriving at the reasonableness requirement. However, it actually did little more than inject the term "reasonable consumer" into every summary statement that rephrased a particular subrule within the traditional deception standard.[72] The Policy Statement thereby diverted attention from the real issue.

By narrowing the Commission's deception enforcement policy to eliminate liability for subjective statements, and by espousing the free market philosophy,[73] the Policy Statement effectively defined

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of the class of persons to whom the representation is addressed.

Cliffdale, 103 F.T.C. at 181 (Policy Statement) (quoting *Kirchner*, 63 F.T.C. at 1290).

69. In *Kirchner*, the Commission acknowledged that unreasonable consumers had also been protected under the deception standard: "[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." 63 F.T.C. at 1290; *see, e.g.*, Charles of the Ritz Dist. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944). In *Charles of the Ritz*, however, the court did not use the reasonable consumer standard but relies, instead, on "capacity to deceive" language. *Id.* at 679-80. *Kirchner* appears to advocate protection of unreasonable as well as reasonable consumers.

70. *See, e.g.*, *In re* Cliffdale Assocs., 103 F.T.C. 110, 178 & nn. 21-22 (1984) (Policy Statement) (citing Sears, Roebuck & Co., 95 F.T.C. 406, 511 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982)); Jay Norris Corp., 91 F.T.C 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979); Chrysler Corp., 87 F.T.C. 719, 749, *aff'd*, 561 F.2d 357 (D.C. Cir 1976); National Comm'n on Egg Nutrition, 88 F.T.C. 89, 185 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977); Rhodes Pharmacal Co., 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955).

71. *See supra* note 27 and accompanying text.

72. "When representations or sales practices are targeted to a specific audience . . . the Commission determines the effect of the practice on a *reasonable member* of that group." *Cliffdale* 103 F.T.C. at 179 (Policy Statement) ("substantial numbers" test); *see supra* notes 37-41 and accompanying text. "When a seller's representation conveys more than one meaning to *reasonable consumers*, one of which is false, the seller is liable for the misleading interpretation. 103 F.T.C. at 178 (Policy Statement) ("literal interpretation" or "double meaning" rule); *see supra* note 27 and accompanying text. "As it has in the past, the Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how *reasonable consumers* are likely to respond." *Id.* at 179 ("total impression" test) (emphasis added); *see supra* note 27.

73. "Certain practices, however, are unlikely to deceive consumers acting reasonably. Thus, the Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion." *Cliffdale*, 103 F.T.C. at 181 (Policy Statement) (footnote omitted).

"reasonable" consumer conduct for future Commission cases.[74] Under the Policy Statment view, reasonableness, requires the consumer to match wits with the more astute vendor who often has given considerable time and attention to developing promotional techniques designed to encourage the buyer to make an unreasonable decision.[75]

Materiality is the third element of the Policy Statement's deception standard. Materiality is generally defined as a practice or misrepresentation which is likely to affect a consumer's decision.[76] Express claims are presumptively material while materiality may be inferred in implied claims.[77] Claims or omissions that concern health or safety are material as is information that is relevant to critical product features.[78] To this extent, the Policy Statement's definition of materiality mirrors the traditional definition.[79] However, the Policy Statement added language asserting that where there is a finding of materiality, "injury is likely."[80]

This indirect approach is actually a step backward from the statutory definition endorsed by Chairman Miller. The earlier construction was explicit in its coverage of the injury element,[81] while

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74. Miller predicted that the free market influence would affect future Commission cases:

> Finally, as a matter of policy, when consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased, the Commission will examine the practice closely before issuing a complaint based on deception. There is little incentive for sellers to misrepresent (either by an explicit false statement or a deliberate false implied statement) in these circumstances since they normally would seek to encourage repeat purchases. Where, as here, market incentives place strong constraints on the likelihood of deception, the Commission will examine a practice closely before proceeding.

Id.

75. In his dissenting statement appended to the Policy Statement, former Commissioner Pertschuk expressed concern for the consumer who might act unreasonably under such conditions:

> [A] small segment of our society makes its livelihood preying upon consumers who are very trusting and unsophisticated. Others specialize in weakening the defenses of especially vulnerable, but normally cautious consumers. Through skillful exploitation of such common desires as the wish to get rich quick or to provide some measure of security for one's old age, professional con men can prompt conduct that many of their victims will readily admit-in hindsight—is patently unreasonable.

Id. at 186-87.

76. *Id.* at 182.

77. *Id.*

78. *Id.* at 182-83.

79. *See supra* notes 17-36 and accompanying text.

80. *Cliffdale*, 103 F.T.C. at 175-76 (Policy Statement).

81. *See supra* note 45 and accompanying text.

the Policy Statement version includes it only in summary fashion.[82]

This distinction is important because by the time *Cliffdale Associates* was decided, "consumer injury" had become a permanent subpart of the materiality requirement rather than a key element of the deception standard.[83] The rationale for the Policy Statement's shift is twofold: (1) under the traditional standard, actual injury was never required to support a deception claim;[84] and (2) the injury factor had received such severe criticism, both from within and outside the Commission, that there seemed to be little support for the idea.[85] Rather than undermine the future viability of the Policy Statement, the majority allowed this aspect of the standard to assume a secondary importance.

IV. MARCH 1984: *Cliffdale Associates*

After Congress had rejected the proposed statutory definition of deception and the Policy Statement, the Commission majority adopted the revised deception standard in *Cliffdale Associates*.[86] *Cliffdale* was the first deception case to be appealed to the full Commission after adoption of the Policy Statement, and it legitimized the "reasonable consumer" approach. *Cliffdale* involved a mail order firm which had been marketing a device known as the "Ball-Matic Gas Saver Valve," claiming that it would provide consumers with substantial gas mileage savings.[87] The Commission charged that such claims were deceptive[88] and that Cliffdale did

82. *Cliffdale*, 103 F.T.C. at 175-76 (Policy Statement).

83. In *Cliffdale*, the Commission stated "[a]s noted in the Commission's policy statement, a material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product. *Consumers thus are likely to suffer injury from a material misrepresentation.*" *Cliffdale*, 103 F.T.C. at 165-66. (emphasis added).

84. *See supra* note 36 for supporting case law.

85. *See Cliffdale*, 103 F.T.C. at 188, 196-97 (Pertschuk & Bailey, Comm'rs, concurring in part and dissenting in part); *see also Deceptive Advertising Hearings*, *supra* note 8, at 86-87 (statements of John J. Easton, Jr., Attorney General of Vermont, representing the National Association of Attorneys General).

86. *Cliffdale*, 103 F.T.C. at 110.

87. The following claims were made regarding the Ball-Matic: "4 Extra Miles Per Gallon"; "100 Extra Miles Between Fill-ups"; "Save up to $200 a year on Gas"; "Tested and Proven, up to 20% increase in fuel economy." *Id.* at 116, 117 (complaint). The Ball-Matic was also represented as a unique product which was needed on all vehicles except Volkswagens, diesel vehicles and fuel-injection vehicles. *Id.* at 158 (initial decision by Brown, A.L.J.).

88. *Id.* at 113.

not have a reasonable basis to substantiate its scientific tests claims.[89] The FTC also charged that there had not been full disclosure regarding the relationship between the company and those persons providing endorsements.[90]

The administrative law judge concluded that Cliffdale's advertisements were deceptive and stated that "any advertising representation that has the tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice which violates the FTCA."[91] Chairman Miller, writing for the majority, seized the opportunity to overturn the "capacity to deceive" standard.[92] As to the administrative law judge's summary of the law of deception Miller stated:

> We find this approach to deception and violations of Section 5 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.
>
> Consistent with its Policy Statement on Deception, . . . 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.[93]

The Chairman relied upon the rationale articulated in the Policy Statement. He reasoned that the "likely to mislead" element was consistent with the "long established principle that the Commission need not find *actual* deception . . . ."[94] He also relied on *Kirchner* to support his conclusion that the reasonable consumer requirement was not a departure from past case holdings.[95] Chairman Miller also cited the same cases cited by the Policy Statement to substantiate the new deception standard.[96]

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89. The company had represented that the test results reflected what a typical consumer could expect. *Id.* at 112.

90. *Id.* at 113 (complaint).

91. *Id.* at 153 (initial decision by Brown, A.L.J.). This language was also quoted in the Commission's opinion. *Id.* at 164.

92. *See supra* notes 40-51 and accompanying text.

93. *Cliffdale*, 103 F.T.C. at 164-65 (emphasis added). Chairman Miller also pointed out that the Commission's earlier approach to deciding deception cases was consistent with the terminology of the reasonable consumer standard despite the use of terms like " 'tendency' or 'capacity' to deceive." *Id.* (footnote omitted).

94. *Id.* at 165.

95. *Id.* at 165 n.8.

96. *Id.* at notes 165-66, nn. 5-14.

The Commission broke down Cliffdale's product claims into four categories: descriptive claims, scientific tests claims, consumer endorsements claims, and lack of a reasonable basis for performance claims. As to the descriptive claims, the majority found that the company had expressly touted the Ball-Matic as an "amazing automobile discovery" and as "the most significant automotive breakthrough in the last ten years."[97] From these claims, the Commission concluded that "a consumer would be reasonable in expecting the average savings from the Ball-Matic to be within the stated range . . . ."[98]

The majority opinion found the descriptive claims to be material because the company had claimed that the product was needed on every car. In fact, the product enhanced gas mileage minimally.[99] Cliffdale's claim "would tend to induce all consumers [including those owning cars for which the product has no utility] to buy the device."[100] Finally, the Commission noted its prerogative of inferring the materiality of express claims.[101]

Cliffdale concluded from its scientific tests that up to a "20 percent increase in fuel economy" was possible through use of the device.[102] The majority found that these advertisements violated the Policy Statement deception standard, because they could be "reasonably understood to imply that competent scientific tests support the performance claims made for the Ball-Matic."[103] The Commission disposed of the materiality issue with the mere conclusion that consumers could not evaluate the product's performance claims, and would therefore, be likely to rely on the scientific support provided by the company.[104]

To endorse the Ball-Matic, Cliffdale hired people who were portrayed as current, actual users of the product to talk about their

97. *Id.* at 166 (opinion of the Commission).
98. *Id.* at 167.
99. *Id.* at 168.
100. *Id.*
101. *Id.*
102. *Id.* at 169. *See supra* note 93 for additional claims made in Ball-Matic advertisements.
103. *Id.*
104. *Id.* at 170. The Commission also connected the injury element to its finding of materiality as to the scientific tests claim: "Clearly these false claims injured consumers by misleading them on a material point." *Id.*

gas mileage savings.[105] The Commission found that reasonable consumers could conclude that all Ball-Matic users would experience similar gas mileage savings, when in fact, they would not.

The Commission also found that the company's failure to reveal that many of the testimonialists were business associates of the product's marketers violated the "Guides Concerning the Use of Endorsements and Testimonials in Advertising."[106] Absent full disclosure of this material connection, the consumer is more likely to accord more weight to an endorsement. This renders the undisclosed fact material.[107] Finally, based on the substantiation doctrine, the Commission concluded that Cliffdale did not have a reasonable basis to support its performance claims. Accordingly, they were held to be presumptively false and deceptive.[108]

Both dissenting commissioners concurred in the result, but disagreed with the application of the reasonable consumer test. Commissioner Bailey was especially concerned that such a straightforward deception case had been chosen to change the standards.[109] Both dissenters commented on the semantic changes in the two standards, comparing "likely" to "tendency," and concluded that the reasonable consumer standard would certainly raise the evi-

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105. *Id.* at 172. The advertisements represented that the testimonials:

1. prove that the Ball-Matic significantly improves fuel economy;
2. were obtained from individuals or other entities who, at the time of providing their endorsements, were independent from all of the individuals and entities that have marketed the Ball-Matic;
3. are statements of persons who have recently used or are currently using the Ball-Matic; and
4. reflect the typical or ordinary experience of members of the public who have used the Ball-Matic.

Id.

106. 16 C.F.R. §§ 255.0 - .5 (1987). The Guidelines are derived to a large extent from the Commission's substantiation doctrine which was formalized in *In re Pfizer, Inc.*, 81 F.T.C. 23 (1972). They govern testimonials provided by both experts and non-experts and also include provisions relating to celebrity endorsers. 16 C.F.R. §§ 255.3(a), .1(b). The so-called "material connection" rule was applied by the Commission before adoption of the Guidelines in 1980. This rule provides that any connection between seller and endorser must be disclosed if the consumer audience would not normally expect it and would, therefore, assign undue credibility to the endorsement. *Id.*

107. *Cliffdale*, 103 F.T.C. at 172-73.

108. *Id.* at 173. The majority stated: "[O]ur previous discussion regarding the validity of [Cliffdale's] test claims makes manifest the inadequacy of their substantiation efforts. Accordingly, we need go no further to conclude that [Cliffdale] did not have a reasonable basis for their claims, and any representation either implied or express, that they did, was false and deceptive." *Id.* (footnote omitted).

109. *Id.* at 189 (Bailey, Comm'r, concurring in the result in part and dissenting in part).

dentiary threshhold for all deception cases.[110] The dissenters saw little need for altering the federal deception standard when the representations at issue so blatantly violated the old standards:

> This is an uncomplicated case involving a number of advertising claims, which are clearly false and deceptive, that could have been addressed with swift and sure justice under existing law. Unfortunately, a majority of the Commission has chosen to use the case as a vehicle to set forth a new legal standard which has little to do with the case and much to do with an ill-advised undertaking to rewrite the law of deception.[111]

The majority did deviate in two significant ways from the deception standard set forth in the Policy Statement. The Commission noted that the "likely to mislead" element reflected the well established principle that a finding of actual deception was not required in order to hold an act or practice deceptive.[112] The case law emphatically supports this conclusion. In *Charles of the Ritz Dist. Corp. v. FTC*,[113] the court stated: "*That the Commission did not produce consumers to testify to their deception does not make the order improper*, since actual deception of the public need not be shown in Federal Trade Commission proceedings."[114] The court was acknowledging that the Commission is capable of deciding whether a representation is deceptive without consumer testimony that an actual deception had occurred. While seeming to embrace this general concept, the majority left a considerable question regarding the role that consumer testimony might play in future cases. In analyzing the Ball-Matic's descriptive claims, the Commission noted: "Evidence as to how consumers actually interpreted these advertisements was not introduced into the record. While such evidence would have been useful, *the Commission believes it can, in this case, interpret the claims as a reasonable consumer would have.*"[115] The obvious question that arises from this com-

110. *Id.* at 190-91, 184-85 (Pertschuk, Comm'r, concurring in part and dissenting in part).

111. *Id.* at 189-90. Commissioner Bailey was particularly concerned that Commission proceedings would become mired in the potentially litigable issue of whether a consumer interpretation is reasonable. *Id.* at 193; *see also* Bailey & Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U. L. REV. 849 (1984).

112. *Cliffdale*, 103 F.T.C. at 165.

113. 143 F.2d 676 (2d Cir. 1944).

114. *Id.* at 680 (emphasis added).

115. *Cliffdale*, 103 F.T.C. at 167, n.17.

ment is what would the Commission have done if the facts in *Cliffdale* had been different. It is fair to assume that since the claims and representations were so easily categorized as deceptive regardless of which standard was employed, the majority had little difficulty in reaching a decision despite an absence of consumer testimony. Does this mean, however, that future Commissions may look to *Cliffdale* as a basis for requiring testimony regarding actual deception in other cases?[116] Such a result would certainly reinforce Miller's view that the actual deception and "likely to mislead" elements are interchangeable.

The *Cliffdale* majority did not resurrect the controversial consumer injury requirement for materiality that had originally been a part of the proposed statutory version,[117] and was a key element in the reasonable consumer standard.[118] The majority followed the Policy Statement view that if a practice is material, then consumer injury is likely, although not definite.[119] However, dissenting Commissioner Pertschuk noted a link between actual deception and materiality.[120] In his view, to require actual deception would be to require a change in the materiality definition so that a consumer injury would be necessary in order for the deceptive practice to be material.[121] A consumer who has been actually deceived, but who has suffered no injury, would not qualify under the reasonable con-

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116. Commissioner Bailey identified this inconsistency in the majority opinion:

> At one point the [majority] opinion seems to equate materiality with the actual effects of claims or practices on consumer conduct, and the Policy Statement expressly states that 'injury and materiality are different names for the same concept' and that 'deception' will be found where an act or practice 'misleads to the consumer's detriment.' (Detriment is, of course, legally defined as injury). The Policy Statement also notes that injury exists if consumers would have chosen differently 'but for' the misleading act or practice, suggesting that reliance and causation are elements of materiality.
>
> *While I don't pretend to understand the full import of these statements, they certainly imply the possible imposition in at least some cases of new evidentiary requirements that are contrary to current law.*

Id. at 196 (Bailey, Comm'r, concurring in part and dissenting in part) (emphasis added and footnotes omitted).

117. *See supra* note 45 and accompanying text for the original statutory definition of deception.

118. *See supra* notes 89-94 and accompanying text.

119. *Cliffdale*, 103 F.T.C. at 165-66.

120. *Id.* at 189 (Pertschuk, Comm'r, concurring in part and dissenting in part) ("If the majority commissioners intend to require proof of actual or likely reliance on the misrepresentations of respondents in future cases, they have changed the meaning of materiality and made it more difficult to establish violations of Section 5.").

121. *Id.* at 188-89.

sumer standard.[122] Thus, *Cliffdale Associates* became the medium by which the Commission formally adopted the Policy Statement's deception standard.

V. Post 1984: Analysis of the *Cliffdale* Caseline

In re Thompson Medical Co.[123] represented the next application of the reasonable consumer standard following *Cliffdale.*[124] The FTC charged the company with making a variety of false and deceptive claims about its product called "aspercreme." In an extensive advertising campaign, Thompson referred to the ointment as "a remarkable breakthrough for arthritis pain,"[125] and compared it with aspirin. The ads emphasized that aspercreme is applied directly to the affected body area, that it penetrates deep into the body, that the product can be used without stomach upset, and that it works faster than aspirin.[126] The Commission charged that Thompson stated directly or implied that aspercreme contains aspirin, that the ointment is a recently developed drug, and that the company had valid, scientific studies proving aspercreme's superiority to aspirin.[127] The complaint concluded by stating that these advertisements violated FTCA section 5 because they had the "capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true."[128] The administrative law judge agreed with the FTC and ordered that: (1) Thompson include in all its advertisements a disclosure that aspercreme does not contain aspirin, (2) Thompson display a similar disclaimer on all product labeling, and (3) the company not misrepresent test results so as to convey the impression that a reasonable basis exists to support product claims.[129]

Before analyzing Thompson's advertising claims, the Commission established the precedential effect of *Cliffdale.* It justified the reasonable consumer standard by stating that advertisers should

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122. This result is consistent with Commissioner Pertschuk's overall view that the purpose of the change in standards "is to withdraw the protection of Section 5 from consumers who do not act 'reasonably.' " *Id.* at 185.

123. 104 F.T.C. 648 (1984).

124. 103 F.T.C. 110 (1984).

125. 104 F.T.C. at 657 (Complaint).

126. *Id*; *see also id.* at 652-56 (Radio TV Reports, Exhibit A-E).

127. *Id.* at 650.

128. *Id.* at 651.

129. *Id.* at 842-44.

not operate in constant fear of potential deception claims that are based on unreasonable consumer interpretations.[130] This rationale, although not specifically made part of the *Cliffdale* ruling, generally reflected the Commission majority's view that the marketplace was an effective regulator of deceptive advertising.

The claims made by Thompson regarding aspercreme did not involve outright, express misrepresentations. Instead, the allegations of deception hinged upon whether the implied claims made by the advertisements were sufficient to mislead a reasonable consumer. One such implied claim was whether aspercreme contained aspirin.[131] The Commission analyzed the average consumer's general understanding of the word "aspirin" and noted that "the ads were drafted with an artful choice of words to make what Thompson thought were *literally correct statements*" regarding aspercreme's comparable pain-relieving capacities.[132] Concluding that the net impression of Thompson's implied claims was adequate to mislead a reasonable consumer, the Commission upheld the administrative law judge's decision and specified the manner in which the company must affirmatively disclose the absence of aspirin in aspercreme.[133]

In re International Harvester Co.[134] marked the third application of the new deception standard. Unlike *Cliffdale* and *Thomp-*

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130. *Id.* at 788 (opinion of the Commission). The Commission stated:

> The purpose of such a requirement is to ensure that the flow of useful, accurate information to consumers will not be deterred by advertisers' fears that they could be held responsible for claims that they could not reasonably have known consumers were going to receive from the ads in question.

Id.

131. *Thompson*, 104 F.T.C. at 791.

132. *Id.* at 792 (emphasis added).

133. *Id.* at 843. The disclosure order was very specific as to all types of advertisements:

> (1) In television advertisements, an explicit simple aspirin disclaimer statement (such as 'ASPIRIN-FREE') shall be superimposed on the television screen simultaneously with a vocal aspirin disclaimer statement (such as 'Aspercreme does not contain aspirin') at the end of each advertisement.
>
> (2) In radio advertisements, an explicit aspirin disclaimer statement (such as 'ASPERCREME DOES NOT CONTAIN ASPIRIN') shall be made at the end of each advertisement.
>
> (3) In print advertisements, an explicit aspirin disclaimer statement (such as 'ASPERCREME DOES NOT CONTAIN ASPIRIN') shall be displayed prominently and conspicuously in relation to each such advertisement as a whole.
>
> (4) In labeling, an explicit aspirin disclaimer statement (such as 'DOES NOT CONTAIN ASPIRIN') shall be prominently and conspicuously printed on the front package panel (or in the front of the container if no package is used).

Id.

134. 104 F.T.C. 949 (1984).

son, however, the Commission ruled that the practice at issue was not deceptive under FTCA section 5.[135] From 1939 through 1975, Harvester had marketed a line of farm tractors which were subject to a phenomenon known as "fuel geysering."[136] Because the gas tank was placed near the engine, the fuel was put through a heating and vaporization process which caused tremendous pressure to build inside the tank. This would occur during normal operating conditions, and if the gas cap were removed or had not been properly tightened, the heated fuel would spray up to twenty feet from the tractor and ignite spontaneously.[137] As a result, a number of tractor operators were seriously injured and at least one person died.[138]

The administrative law judge held that Harvester's failure to issue a proper, timely hazard warning to its consumer operators constituted "unfair and deceptive acts and practices and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act."[139]

Finding that Harvester's actions constituted a "pure omission,"[140] the Commission determined that the evidence supported the unfair practice claim but not the deception claim.[141] The Commission refused to accept the judge's conclusion that Harvester's knowledge of the fuel geysering problem since 1955 constituted deception.[142]

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135. The Commission stated:

> While failure to disclose certain material facts may cause consumer injury and lead to liability under Section 5, it is important to distinguish between the circumstances under which such omissions are *deceptive*—in that they are likely to cause injury to consumers by affirmatively misleading their informed choice—and the circumstances under which they amount to an *unfair practice*—one which causes substantial, unavoidable injury to consumers that is not outweighed by any countervailing benefits. We do not find that the facts describe a practice which causes injury by deception, and so we reverse that conclusion of the initial decision.

Id. at 1050-51 (footnote omitted).

136. *Id.* at 950 (Complaint).

137. *Id.*

138. *Id.*

139. *Id.* at 1049.

140. The majority described a "pure omission" as "a subject upon which the seller has simply said nothing, in circumstances that do not give any particular meaning to his silence." *Id.* at 1059.

141. The Commission defined an unfair practice as one causing substantial injury to consumers and not overcome by any counter benefits. *Id.* at 1051. A deceptive practice was described as one likely to injure a consumer by materially altering her choice selection process. *Id.* at 1050-51; *see supra* note 135.

142. *Id.* at 1033 (initial decision).

The Commission recognized that, under traditional deception theory,[143] deception may occur where a seller fails to disclose certain facts in such a manner so as to create a misrepresentation.[144] In *Harvester*, however, the Commission found that it would not be economically feasible to call all omissions deceptive,[145] and therefore distinguished between "pure" and "non-pure" omissions. It noted that pure omissions exist where the seller has said nothing and such silence has no particular meaning. The Commission was concerned that a tremendous economic burden would be imposed on the seller if all potential consumer interpretations had to be considered in order to avoid a deception charge.[146] Pure omissions are also not deliberate, and it therefore must be considered whether any "corrective disclosure would necessarily engender positive net benefits for consumers or be in the public interest."[147]

Thus, a finding of deception was justified only when an application of a cost-benefit analysis to the omission resulted in a significant gain to consumers.[148] In this case, the complaint charged that Harvester's silence resulted in a breach of the implied warranty of fitness.[149] Applying the cost-benefit theory, however, the full Commission held that an undisclosed safety risk is not presumptively a warranty breach since the key is the "degree of risk involved."[150] Since there is only a small risk of harm, it cannot be said that a product is inappropriate for normal usage.[151]

Consequently, pure omissions do not fulfill the first part of the reasonable consumer deception policy which requires a misrepre-

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143. *Id.* at 1058.
144. *Id.* at 1057 (opinion).
145. *Id.* at 1059.
146. *Id.* The majority opinion categorized the potential misconceptions as "literally infinite," *id.*, and detailed the problems that would beset sellers:

> Since the seller will have no way of knowing in advance which disclosure is important to any particular consumer, he will have to make complete disclosures to all. A television ad would be completely buried under such disclaimers, and even a full-page newspaper ad would hardly be sufficient for the purpose. For example, there are literally dozens of ways in which one can be injured while riding a tractor, not all them obvious before the fact, and under a simple deception analysis these would presumably all require affirmative disclosure. *The resulting costs and burden on advertising communication would very possibly represent a net harm for consumers.*

Id. at 1060 (footnote omitted) (emphasis added).
147. *Id.* at 1059.
148. *Id.*
149. *Id.* at 1058.
150. *Id.* at 1063.
151. *Id.*

sentation.[152] An evaluation of the "degree of risk involved" in Harvester's pure omission showed that the geysering accident rate had been less than .001 percent over a forty-year period,[153] and that use of the tractor could not be considered "inherently unreasonable or imprudent."[154] The *Harvester* ruling's apparent requirement of a cost-benefit analysis will complicate the streamlined legal procedures of a deception action in future close cases.[155]

The dissent disputed the majority's conclusion that Harvester's silence did not constitute a deceptive practice.[156] Commissioner Bailey argued that this was an uncomplicated case involving latent product safety hazards and the failure of a seller to warn of the attendant damages. She rejected the Commission's notion that Harvester's conduct could be construed as unfair but not deceptive and viewed this diminishment in policy enforcement as an affront to the existing law of deception.[157] Relying on the fact that Harvester knew of the product defects since 1963, the dissent rejected the conclusion that there was no implied warranty of fitness for normal use.[158] The dissent also suggested that the majority had tailored its decision to its analysis of the statistical risk of injury posed by the geysering defect.[159]

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152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 1063-64.

156. Commissioner Bailey characterized the majority's approach as "entirely novel" and "nearly incomprehensible" as it related to the existing law of deception. *Id.* at 1077 (Bailey, Comm'r, dissenting).

157. *Id.*

158. *Id.* at 1078 (citing Stupell Enterprises, Inc., 67 F.T.C. 173 (1965)). Commissioner Bailey pointed out that Harvester did nothing to change the fuel warning instructions from 1963-1976 and that manufacturers have an obligation to disclose nonobvious safety hazards. In *Stupell*, the Commission observed that:

> The Federal Trade Commission Act imposes no requirement of disclosing the risks of breakage where those risks are obvious or apparent, for in such a case non-disclosure is not deceptive. We merely apply to the facts here the well-established rule that where breakage is likely to occur in the normal use of the product, and the hazards of such breakage are not apparent or obvious, at least to many consumers, non-disclosure of such risk is deceptive and therefore unlawful.

Stupell Enterprises Inc., 67 F.T.C. 173, 187 (1965).

159. *Id.* at 1078 (Bailey, Comm'r, dissenting). The dissent noted that the failure to disclose material facts may have the capacity to mislead even where the representation is presented in an overall truthful context. *Id.* at 1079. Bailey went on to summarize the Commission's view in previous omission cases: "[D]eception may occur when important information is omitted from the sales presentation or from other aspects of a commercial transaction. While in order to be material a misleading omission must generally pertain to a consumer's purchasing decision, it may also concern the use or care of a product." *Id.* (footnotes omitted).

Bailey rejected any link between these two factors, preferring instead to focus on the Commission's previous treatment of omissions. She pointed out that implied misrepresentations have long been viewed as "an integral part of the law of deception,"[160] due in part to the Commission's desire to protect consumers from any justifiable but erroneous assumptions about product safety.[161] Reliance upon a cost-benefit analysis that focused on actual accidents rather than those that could reasonably be expected to happen impaired the Commission's consumer protection goal by carving out a separate category of conduct for special treatment—that of pure omissions.[162]

The reasonable consumer standard has been upheld by a federal appellate court. In *In re Southwest Sunsites, Inc.*[163] three companies were charged with making deceptive representations in land sales advertising. The companies sold parcels in Western Texas varying in size from five to forty acres. Representations were made that the land was suitable for building homes, personal farming, or noncommercial ranching.[164] Additionally, prospective purchasers were provided with maps showing ongoing oil exploration in the immediate vicinity and representing that land values would rise dramatically as a result of oil companies establishing permanent operations in the area.[165] It was also misrepresented both orally and in writing that a nuclear power plant might be built locally. Southwest Sunsites used this potential for commercial development to bolster its advertising claims that the land was a good investment.[166] The administrative law judge rejected the FTC's argument that the practices in question were deceptive in violation of the FTCA.[167]

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160. *Id.*

161. Porter & Dietsch v. F.T.C., 90 F.T.C. 770, 873-74 (1977), *aff'd*, 605 F.2d 294, 303 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *see also Cliffdale*, 103 F.T.C. at 176 (Policy Statement).

162. *International Harvester*, 104 F.T.C. at 1083-84.

163. 105 F.T.C. 7 (1985), *aff'd*, 785 F.2d 1431 (9th Cir. 1986).

164. *Id.* at 38 (initial decision). Count II of the complaint charged that such claims were misrepresentations because of the questionable availability and cost of utilities, the subdivider's failure to complete prescribed improvements, and actions by the subdividers which caused a substantial impairment of the buyers' ability to use their lots for the purposes promised by the sellers. *Id.* at 11. The complaint went on to allege that had the buyers been aware of these nondisclosed factors, their decision to purchase would have been materially affected. *Id.*

165. *Id.* at 21-22.

166. Potential buyers were told variously that "a lot of exploration" for oil had been conducted locally, and that there was "great potential."

167. *Id.* at 99.

The Commission, which was unanimous in its decision to overturn the judge's decision, found that the meaning of Southwest's express representation was clear and thus did not require further interpretation.[168] The majority said "that consumers acting reasonably in the circumstances would have interpreted them precisely as they were made."[169] As to implied representations, the Commission clarified that the *Cliffdale* standard looked to the manner in which consumers would reasonably have interpreted the representations. The Commission appeared to retreat somewhat from this position in a footnote which confused the issue whether the new deception standard focuses primarily on potential consumer *conduct* or possible consumer *interpretations*.[170] From a defrauded consumer's point of view, however, proving interpretations would be much easier than proving what constitutes reasonable consumer conduct.

Even if *Southwest Sunsites* represents a step back toward the traditional deception standard, that step may arguably be negated by the language of Court of Appeals for the Ninth Circuit's opinion. The court upheld the Commission's decision that FTCA section 5 had been violated[171] and found that the Commission had not violated the Administrative Procedures Act in establishing the new deception standard.[172] It also concluded that the "likely to mislead" standard imposes a higher burden of proof on the FTC in

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168. *Id.* at 147. While concurring in the Commission's conclusion Commissioner Bailey concluded that Southwest Sunsites had engaged in deceptive trade practices, Commissioner Bailey refused to endorse the *Cliffdale* reasonable consumer standard. The opinion stated:

> Commissioner Bailey believes that respondents' practices here were deceptive and violated Section 5 of the FTC Act because they *tended* to mislead a substantial number of consumers in a material way by presenting respondents' land, inaccurately, as attractive, money-making investment property that was suitable for a wide range of uses and that did not have any significant drawbacks or limitations. She also agrees that these practices were likely to mislead consumers acting reasonably under the circumstances in a material way, though she does not endorse the use of this standard.

Id. at 147 n.79 (emphasis added).

169. 105 F.T.C. at 148.

170. In this footnote, Commissioner Bailey stated: "It is important to remember that this evaluation does not focus on whether it was reasonable for consumers to believe or act on the representations at issue. It focuses instead on whether consumers could reasonably interpret the advertising or statements to convey the implied representations." *Id.* at 148 n.80.

171. *In re* Southwest Sunsites, Inc., 785 F.2d 1431 (9th Cir. 1986).

172. *Id.* at 1435.

deception cases.[173] Thus, at least one appellate court has found the new standard to be a significant departure from past Commission precedent.

The FTC most recently dealt with the deception issue in *In re Figgie International, Inc.*,[174] which involved the manufacturer of fixed-temperature "Vanguard" heat detectors. The company sold the heat detectors, and smoke detectors procured from outside manufacturers, through a nationwide distributor network.[175] Distributors conducted in-home sales presentations,[176] using promotional literature and slide presentations provided by the company. The promotional material claimed that heat detectors provide immediate early warning of fires and do so faster than smoke detectors.[177] One information bulletin stated that "*Heat Detectors Have Probably Saved More Lives And Property Than Any Other Fire Protection Device.*"[178] In its complaint the FTC charged that the company inappropriately represented that: 1) the Vanguard heat detectors provide sufficient warning to allow home occupants to escape a fire, and 2) that the combination of heat and smoke detectors "provide significantly greater fire warning protection for occupants than smoke detectors alone."[179] On appeal, the full Commission upheld the decision of the administrative law judge that Figgie's promotional tools were deceptive.[180]

Citing *International Harvester* and *Cliffdale*, the Commission stated that Figgie's conduct was governed by the "likely to mis-

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173. The Ninth Circuit stated:

> Each of the three elements of *the new standard challenged by petitioner imposes a greater burden of proof on the FTC to show a violation of Section 5.* First, the FTC must show probable, not possible, deception ("*likely* to mislead," not "*tendency and capacity to mislead*"). Second, the FTC must show potential deception of "consumers acting reasonably in the circumstances," not just any consumers. Third, the new standard considers as material only deceptions that are likely to cause injury to a reasonably relying consumer, whereas the old standard reached deceptions that a consumer might have considered important, whether or not there was reliance.

Id. at 1436 (emphasis added to first sentence only).

174. 107 F.T.C. 313 (1986).

175. *Id.* at 317-18 (initial decision).

176. *Id.* at 318.

177. The materials used during the in-home presentation included: testimonial letters, slide shows, booklets, brochures, demonstration materials, and government fire study excerpts. All the promotional literature was aimed at convincing the consumer to purchase Vanguard heat detectors in systems that contain a nominal number of smoke detectors. *Id.* at 320.

178. *Id.* at 325.

179. *Id.* at 314 (complaint).

180. *Id.* at 396 (opinion of the Commission).

lead" deception standard.[181] As presented, the deception standard was virtually identical to that articulated in *Cliffdale*, and there was no discussion of whether consumer injury was an integral part of the standard.[182]

The Commission first dealt with the question of materiality and concluded that Figgie's claims could be presumed material for two reasons. First, express claims are always presumed material. Second, representations which relate to the primary features of the product are likewise presumed material.[183]

The Commission reviewed record evidence of independent tests refuting the company's claim that heat detectors provide adequate warning to allow most people to escape safely from a residential fire.[184] To decide the impact upon a reasonable consumer of Figgie's promotional claim that heat detectors provide significantly greater fire protection than smoke detectors alone, the Commission reviewed the basis for this claim independently.

The company claimed that heat detectors are more appropriate in certain rooms where smoke detectors are not generally recommended, such as the kitchen, where false alarms may be caused by cooking smoke.[185] The Commission concluded that such claims were not deceptive unless they were unsupported by substantiating evidence.[186]

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181. *Id.* at 374.

182. *See supra* notes 79-85 and accompanying text.

183. *Figgie Int'l, Inc.*, 107 F.T.C. at 378-79. The Commission also noted that Figgie did not offer any evidence to rebut the finding of materiality. *Id.* at 379.

184. *Id.* at 380-83. Two major independent testing programs contradicted Figgie's claims about the Vanguard heat detector. In 1978, the California Fire Chiefs' Association Residential Fire Detector Test Program was conducted. Its purpose was "to investigate and report on residential fire detector response, reliability, and life safety potentials under realistic conditions." *Id.* at 380. A one-story and a two-story house were used to simulate actual conditions encountered in a residential fire. The houses were completely furnished and equipped with a wide variety of fire detectors. *Id.* at 381.

The second testing series, the Indiana Dunes Tests, was conducted from 1974 to 1976 by the National Bureau of Standards and Underwriters' Laboratories. Procedures were similar to those in the California Fire Chiefs' Test Program. In all of the tests, a smoke detector was the first to sound an alarm. Additionally, the smoke detectors always allowed persons more time to escape than did the heat detectors. Due to criticism of the Dunes I test result, the Vanguard heat detector was tested in a Dunes II program. Vanguard's performance in Dunes II was considerably poorer than in Dunes I. *Id.* at 382.

185. *Id.* at 389.

186. *Id.* at 390. The Commission further stated that such claims "must not exaggerate the extent of that additional protection and must disclose any qualifying information needed to correct misimpressions the claims would otherwise cause." *Id.*

Figgie also asserted that heat detectors provide additional safety because they are mechanically activated and do not depend on an electrical power supply or batteries, both of which cannot be relied upon to operate properly during a residential fire.[187] The Commission concluded that this claim would be deceptive if it was exaggerated or not substantiated by additional evidence.[188]

Finally, Figgie contended that the heat detector is superior to a smoke detector in its ability to provide earlier warning of a fire.[189] The independent tests refuted this claim and constituted the sole basis for the Commission's finding that Figgie had made a false representation.[190]

In response to Commissioner Bailey's complaint that the traditional deception standard should have been applied, the Commission stated that Figgie's practices "were deceptive under either analysis of a deceptive act or practice."[191]

Thus, the Figgie case does not continue the major shift in deception enforcement policy that was seen in *International Harvester Co.*[192] *Figgie* does suggest, however, that the Policy Statement's "likely to mislead" standard is not likely to become entrenched in FTC deception policy as former Chairman Miller so ardently desired.[193]

VI. Conclusion

The change in deception standards advocated by the 1983 Policy Statement represented a significant shift in consumer protection. Under the traditional standard, the Commission sought to protect consumers from all potential adverse consequences of deceptive

187. *Id.* at 391. Figgie emphasized that the simplicity of the heat detector made it a more reliable fire protection device. Numerous experts testified on the company's behalf to endorse this claim. *Id.*

188. *Id.*

189. *Id.* at 392 n.6.

190. *See supra* note 184.

191. *Figgie Int'l, Inc.*, 107 F.T.C. at 392. The National Fire Protection Association provided the Commission additional support. Based on various test results, this Association concluded: "the results, of full-scale experiments conducted over the past several years . . . indicate that detectable quantities of smoke precede detectable levels of heat in nearly all cases." *Id.*

192. *See supra* notes 143-47 and accompanying text. Although *Figgie* did not involve unfair practices, the Commission opinion noted the "pure omission" distinction which had been drawn in *International Harvester*. 107 F.T.C. at 379 n.17.

193. *See supra* note 44 and accompanying text.

advertising. Chairman Miller believed that such protection should only be afforded after the free enterprise system had been allowed to purge itself of businesses that actively engaged in deceptive promotional practices. The Policy Statement was premised on the belief that consumers are able to protect themselves, and even if a consumer is deceived once, a prudent consumer will not allow it to happen a second time.[194]

Those cases decided after *Cliffdale*, reveal the Commission's attempt to formalize the new deception standard. The FTC systematically employed the "likely to mislead" approach, abandoning only Chairman Miller's preference for equating materiality with injury.[195] These cases are consistent in all respects, except that *International Harvester* mandates that a cost-benefit analysis precede any application of a streamlined deception procedure. Given these developments, it is difficult to accept Miller's reassurance that no significant changes have been made to the FTC's deception enforcement policy.[196] There is still substantial disagreement on this issue, and at the very least, the FTC's deception standard is still in a state of flux.

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194. In a formal statement presented to the Senate Committee on Commerce, former Chairman Miller stated:

> When a product is low in price, is frequently purchased, and is easy to evaluate, there is no incentive to mislead. Although consumers may purchase the product once, they will not do so again. Thus, the returns from a single purchase are unlikely to cover the costs of disseminating the false advertising for a product that meets these conditions. *In short, in this class of cases, the market works—deception is not a viable business strategy.*

Deceptive Advertising Hearings, *supra* note 8, at 17 (emphasis added and footnote omitted); *see also* 103 F.T.C. at 181 (Policy Statement).

195. 103 F.T.C. at 176 (Policy Statement).

196. From the beginning, Chairman Miller viewed his suggested statutory deception standard as vastly superior to the case law approach developed by the FTC:

> [T]he propsed [sic] standard will greatly alleviate, if not eliminate, the many problems arising under the current statute [FTCA Section 5] with its lack of explicit standards. The absence of a clear definition of deception has resulted in cases that are often cited to illustrate the Commission's inappropriate use of its discretion. Even more importantly, the proposed standard will correct the inadequacy of the present statute under which consumers and businesses have been injured, rather than protected.

Deceptive Advertising Hearings, *supra* note 8, at 20-21.