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# COMMERCIAL SPEECH: ESSENTIAL FOR HEALTH OF CONSUMERS AND FREE ENTERPRISE

by

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The importance of advertising to our market economy is clear; nonetheless, this fact is too often forgotten and ignored in today's public policy debates. Once again, advertising is under growing assault. This LEGAL BACKGROUNDER will first review the case for advertising, with special attention to health care. Then, it will discuss how that case applies to the current controversies about health, including obesity and "direct-to-consumer" (DTC) medical product advertising.

The benefits of advertising are especially significant regarding health. Advertising can educate consumers about diet-disease relationships, increase their awareness of diseases, inform them of different treatment options, and empower them to improve their health. The ability to advertise also encourages competitors to develop new products and to improve existing ones. Advertising complements and amplifies, the educational material that governments and the general media provide.

When food marketers make health and nutrient content claims for their products, consumers become more aware of the significance of the nutrients in foods. They are also more likely to consult the nutrition facts panels to learn more. As consumers become interested in purchasing more nutritious products, food marketers have powerful economic incentives to develop and market healthier products. Comparative advertising among food marketers, in particular, often highlights why one brand is more nutritious than another. Such marketing pressures competitors to make their food products more nutritious.

Historical changes in regulation allow us to examine the impact of both more and less restrictive approaches to advertising. Two such examples illustrate the significant benefits that flow from truthful nutrient and health claims. Consider first the relaxation of food labeling policies in the 1980s to allow more advertising about high-fiber diets and cancer risk. Significant changes in consumer choices of cereal followed these fiber/cancer claims. By 1987, consumers had substantially increased their consumption of high-fiber cereals, with the greatest increase in groups that had previously consumed such cereals the least. The market share for high-fiber cereals increased by almost four percentage points — a \$280 million increase in sales — and more of these cereals were introduced.

Consider also the extent of health information in advertising, particularly as it relates to fat and saturated fat, before and after implementation of the Nutrition Labeling and Education Act (NLEA). Before the act, advertising claims had increasingly linked the fat content and composition of various foods to heart disease, leading to significant reductions in fat consumption. Unfortunately, NLEA labeling regulations

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permitted health claims only for foods with the best overall nutritional profile. Not surprisingly, health claims in food advertising plummeted.

One dramatic example was health claims relating saturated fat to heart disease. In 1990, one-third of ads for products like cooking oil and margarine explained the heart health benefits of reducing saturated fats. After the NLEA regulations, the claims disappeared. These products were not perfect foods, but they were better for your heart than comparable products. Food marketers also decreased their discussion of the saturated fat content of cooking oils and margarine. Unfortunately, consumers appear to have shifted toward purchasing cooking oils with higher saturated fat content.

Even without direct health consequences, truthful advertising benefits consumers. Economic theory predicts, and a host of studies confirm, that advertising can stimulate firms to compete on both price and quality. Whether the product is eyeglasses, legal services, or even toys, studies have found that advertising leads to more competition and to lower prices. Advertising of prices provides the clearest evidence of how advertising can make products cheaper. Yet, even non-price advertising that provides useful information to consumers may help reduce prices by increasing consumer awareness of similar products.

Recognition of the economic importance of advertising has grown, and has been enshrined in the Supreme Court's First Amendment jurisprudence. The free flow of truthful and non-misleading commercial speech empowers consumers to make better-informed purchases and maximizes consumer welfare. Despite the widespread recognition of the importance of commercial speech, attacks on advertising are growing. Whatever it is that people do in excess, many observers assume that advertising is the cause. Indeed, with every new problem, the inherent visibility of advertising almost assures that the search for solutions will at some point lead to calls for ad restrictions. Such restrictions are visible and, mistakenly, appear to be an inexpensive fix.

Nothing better illustrates the tendency in many quarters to blame advertising than the problem of obesity. Nearly two-thirds of adults are either overweight or obese. The rate of overweight children ages 6 to 11 has more than doubled since 1980, and the rate for adolescents has tripled. This is a striking development with both immediate and long-term health consequences: Even children are now being diagnosed with Type 2, "adult onset" diabetes. Of course, the alarming increase in obesity is a complex public health issue that demands effective response by parents, industry, physicians, consumer advocates, and government. One of the earliest ideas to surface was the suggestion to ban television commercials for junk food that were directed at kids. This chestnut first surfaced at the Federal Trade Commission (FTC) in the late 1970s. It didn't go anywhere then — and it shouldn't go anywhere now. In fact, the FTC's experience with proposals like this one shows that advertising bans are like the quick-fix weight-loss products the FTC frequently challenges: appealing on the surface, but ultimately useless.

Many who attack advertising are attempting to rewrite the history of the FTC's "kid-vid" rule. They blame business lobbying for the rule's demise. Although businesses did condemn the rule, the most important opposition was from *The Washington Post*, which called the FTC the "national nanny." In fact, the rule fell of its own weight. Banning junk food ads on kids' programming is impractical, ineffective, and illegal.

It is impractical because, although kids see many food ads on children's programming, most ads they see air on programs not directed to them. The FTC's 1978 proposal to ban advertising on programs for which young children comprised at least 30% of the audience would have affected only one program: the now iconic "Captain Kangaroo."

A ban would be ineffective because there is no reason to think that the ads kids see make them obese. Although American children see thousands of food ads each year, they have done so for decades — since long before the dramatic upswing in obesity. Today's kids actually watch less television than previous generations and have many more commercial-free choices. Even our dogs and cats are fat, and it is not because they watch too much advertising.

Finally, a ban would be illegal. Food is not alcohol or tobacco; it is not illegal to sell food to kids. Our First Amendment requires government to demonstrate that restrictions on truthful, non-misleading commercial speech for legal products meaningfully advance a compelling interest. Because a children's advertising ban would be ineffective, it would fall considerably short of that test. Attacking food advertising may offer the illusion of progress in the fight against child obesity, but in the end, Americans must eat less and exercise more.

More importantly, a ban on ads targeting kids would impede the progress we must make. Advertising can help fight obesity. We need to harness the power of advertising to spur competition against obesity. Year after year, manufacturers have shown great ingenuity in pitching foods to kids as tasty and fun; their goal now is to develop and promote healthy foods. Manufacturers have begun to improve their products by reducing the amount of calories and reducing serving sizes to help consumers eat more sensibly. The challenge is to make those foods attractive to children, as well as to adults and nutritionists. Meeting that challenge will likely require marketing that responsibly addresses children, rather than avoids them. Because most of the advertising that children see does not appear during children's programming, avoiding children is simply impossible. And because kids are getting heavier while watching fewer ads, further reductions are unlikely to reduce obesity. Nor are attempts to avoid programs with a high percentage of children in the audience likely to reduce the pressure from advocates and interest groups to do even more. In the end, this is a game that advertisers cannot win. It's like trying to feed the tiger more steaks in the hope that it will eventually decide that it's had enough meat and turn vegetarian.

Obesity is not the only public issue in which advertising is under attack. DTC advertising of prescription drugs is also controversial. Critics are already trying to link the Vioxx problems with DTC advertising. They contend fewer people would have been at risk from the unknown side effects of a new drug if there had been less marketing of the drug to consumers. Pressed to the extreme, this is an argument that says that new drugs are fine, as long as consumers do not know about them.

Anecdotes aside, the evidence is strong that DTC advertising benefits consumers. Since the voluntary moratorium on such ads ended, several surveys of consumers suggest that DTC advertising has stimulated discussions between doctors and patients. One consistent finding is that DTC advertising provides consumers with useful information. Ads fulfill much of this informative role indirectly, by encouraging consumers to find more information from other sources about the advertised drug and the condition it treats. DTC advertising has encouraged consumers to learn more about previously undiagnosed conditions, but has not prevented doctors from recommending non-drug therapies. One survey estimated that DTC advertising motivated 60 million patients to talk with their doctors about a health condition and possible treatments for it. For 60 percent of these consumers, the conversations included recommendations for non-drug therapies.

Consumer surveys also suggest that DTC advertising has not harmed the doctor-patient relationship. Among consumers in a Food and Drug Administration (FDA) survey in 2002 who asked about a specific brand after seeing a DTC advertisement, 93% reported that their doctor welcomed the question, and only 3% said that the doctor was angry or upset. Although physicians have mixed views about the overall effect of DTC advertising on their relationships with patients, 82% of those polled in an FDA survey reported that advertising did not adversely affect their interactions. Perhaps most important, this FDA survey provided little support for the notion that DTC advertising encourages improper prescribing. Only 5% of physicians reported "pressure to prescribe" as a negative effect of DTC advertising.

Critics have long pointed to the rapid growth in DTC advertising as contributing to the rising costs of prescription drugs. Yet, DTC advertising costs only 2.2% of total sales and remains small relative to expenditures on detailing and free sampling. Moreover, total spending on all forms of drug promotion has remained fairly constant at 14 to 15 percent of product sales. We should not sacrifice all the benefits DTC ads offer to misplaced fears of price increases or fear that consumers will actually use the products as they become available.

Even with significant progress toward allowing truthful advertising, there is a lingering danger that attacks from advocacy groups will erode those gains. As we have already discussed, the significant benefits to health claims for foods have been well documented. After 20 years of effort by FTC staffers and numerous reversals of FDA restrictions on First Amendment grounds in the federal courts, the FDA, under former Commissioner Dr. Mark McClellan finally recognized the need to permit truthful health claims even without scientific consensus. The FDA now permits so-called "qualified" health claims, based on credible scientific evidence that does not rise to the level of significant scientific agreement. The marketer must appropriately qualify the claim. For example, the FDA approved a qualified claim that foods high in omega-3 fatty acids may reduce the risk of heart disease. However, the claim must also disclose that the FDA has concluded that the scientific evidence supporting the claim is not conclusive.

The need for this change was clear. Despite rapid improvements in the scientific knowledge of the relationships between diet and disease, after ten years under the NLEA, the FDA had approved only a dozen claims. In just over two years since the policy was first announced, the FDA has already approved eight qualified claims. The ability to make these claims means that new scientific information reaches consumers far more quickly. Of course, health claims that are not conclusive require proper qualification to ensure the consumers are not misled. Copy testing research by the FTC indicates that such qualifications are possible, and can effectively convey that scientific uncertainty remains.

Shortly after the FDA announced its new policy, Public Citizen and the Center for Science in the Public Interest sued to block it. They argued that qualified health claims would "turn the supermarket aisle into a Tower of Babel," and that the FDA must act through rulemaking, rather than by issuing industry guidance. The suit was dismissed, in part because the FDA had not yet approved any qualified claims when the suit was filed. Obviously that status has changed and a new suit remains a real possibility.

When issues do arise in which advertising may be implicated, advertising is at risk in part because it is misunderstood by many policy advocates. Some interest groups are devoted to the belief that they know what consumers want better than the consumers themselves. Not content with trying to influence consumers, they see advertising as the omnipresent persuader that convinces consumers to buy things they do not need, to want things they should not want, and to do things they should not do. Rather than a source of information that consumers can use as they please, those advocates see advertising as a means of manipulation that, as activist group Commercial Alert says on its web page, is "subverting the higher values" of our country.

Clive Barnes described television as "the first truly democratic culture — the first culture available to everybody and entirely governed by what the people want. The most terrifying thing is what people do want." Or, in the words of the comic strip Pogo, "We have met the enemy and it is us." The same can be said about advertising. To inform and persuade in a memorable fashion, advertising reflects the culture around us. Too often, advocates of all persuasions assume that advertising creates the culture, and that if only advertising would change or were limited, the culture would somehow be different. Whether the problem is teenage alcohol consumption, cigarettes, obesity, or violence in the media, the initial assumption in too many quarters is that advertising is the root of that particular evil, and many others as well.

Restrictions on advertising are akin to the age-old response of shooting the messenger. Markets are extraordinarily effective in providing consumers with the products and services they desire at the lowest possible price. If we are to respect individual choices, we must recognize that some will make choices with which we disagree. Restricting the flow of commercial information will do little to change those choices. But it will make the market less effective and efficient as a means of satisfying consumers' preferences. The answer, as the Supreme Court's First Amendment jurisprudence has long reflected, is more information. We need a free and open debate, rather than suppressing information about choices we dislike.