June 1974

Abatement of Corporate Image Environmental Advertising

Charles E. Ludlam

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38PB9F

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Abatement of Corporate Image Environmental Advertising*

Charles E. Ludlam**

Since the early part of this century, many corporations have been spending considerable portions of their advertising budgets on attempts to project favorable public images. In recent years much of this image advertising has been focused on mammoth campaigns designed by many of the largest industrial concerns to portray themselves as leaders in the fight for a clean, healthy environment. This Article, written by an attorney for the Federal Trade Commission, describes and categorizes the nature, extent, and effects of corporate image advertising, especially that dealing with environmental issues. The author discusses the applicability of the first amendment guarantee of free speech to this advertising, delving into the "commercial speech" exception delineated by the Supreme Court. Pointing out the need to control such advertising, he outlines a possible regulatory role for the Federal Trade Commission.

Corporate advertising designed to project a positive environmental image is prevalent in the nation's communications media and has become especially common following the advent of the "energy crisis."1

* Remarks made in this article are solely those of the author and are not intended to be, and should not be construed as, representative of an official Federal Trade Commission policy. In presenting the author's views it must be emphasized that no reference is intended to the merits of any case or investigation currently before or contemplated by the Commission; to do so would be unfair to the parties concerned and would be to rely on incomplete facts.

This article incorporates and elaborates upon a speech written with the assistance of the author and delivered by David S. Dennison, former Commissioner, Federal Trade Commission, at the 1973 FORTUNE Corporate Communications Seminar held at the Sterling Forest Conference Center, Tuxedo, N.Y., on May 2, 1973. The speech was reviewed briefly in Value of Corporate Ads Debated by Agency Men, ADVERTISING AGE, May 21, 1973, at 26. The text of that speech is reprinted in Crosscurrents in Corporate Communications No. 2, Highlights of the 1973 Fortune Corporate Communications Seminar, published by Time Magazine Inc. Copies may be obtained for $1.75 from James B. Hoefer, Advertising Director, FORTUNE, Time-Life Building, Rockefeller Center, New York, N.Y., 10020.


1. The definition and extent of corporate image advertising are discussed in text
This advertising has often been a subject of criticism. Although it is defended by some for its education of the public on activities of companies that have "joined the fight against pollution," many environmentalists consider this advertising to be "ecopornography.

Whatever one's reaction to environmental advertising, its prevalence poses a significant challenge for the Federal Trade Commission, which is charged with regulating false, deceptive, or unfair advertising, accompanying notes 18-21 infra. Oil company image advertising in particular is recent in evidence. See Oil Ads Center on Corporate, TBA, ADVERTISING AGE, Sept. 17, 1973, at 1; Winter Heating Outlook Tops New Oil Ad Themes, ADVERTISING AGE, Oct. 29, 1973, at 1; Energy Boss Warns Oil Marketers: No Gasoline Promotion, ADVERTISING AGE, Aug. 12, 1974, at 1; Amoco's Ads Tell Benefits of Lead-Free Fuel, ADVERTISING AGE, Oct. 14, 1974, at 4.


4. See note 2 supra.

5. For an excellent summary of the first amendment and other issues facing the FTC in regulating image advertising, see Address by former Commissioner Mary Gardner Jones, Public Service Oriented Advertising: A Regulatory Dilemma, presented before the Corporate Counsel Ass'n of Minn., Apr. 30, 1971 (Copies available upon request to the Office of Public Information, Federal Trade Commission, Washington, D.C. 20580).

6. Recent cases have held that an advertisement may be unfair without being false or deceptive. See FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); compare In re Pfizer, Inc., 81 F.T.C. 23 (1972) with In re Firestone Tire & Rubber Co., 81 F.T.C. 398 (1973), aff'd, 481 F.2d 246 (6th Cir. 1973), cert. denied, 94 S. Ct. 841 (1973). In Sperry & Hutchinson the Supreme Court noted that the Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

'1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at
and for other governmental and non-governmental bodies with potential interests and jurisdiction in this field. This challenge poses questions both of law and policy. The legal questions arise under the first amendment, which may bar the exercise of FTC jurisdiction. The policy questions arise if that jurisdiction is established. This article will deal only with corporate image environmental advertising, not corporate product advertising, because no barrier exists to the Federal Trade Commission's active regulation of false, deceptive, or unfair product advertising regarding the environmental consequences of a product.8

least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Id. at 244-45, n.5, citing the Statement of Basis and Purpose of Trade Reg. Rule 408 (Cigarette Rule), 29 Fed. Reg. 8355 (1964). In Pfizer, supra, the Commission stated that it is an unfair practice to make claims in advertising for which the advertiser has no "reasonable basis." Id. at 62, 64. The precise formulation of this standard "is an issue to be determined . . . on a case-by-case basis." Id. at 64. See In re Nat'l Dynamics Corp., 82 F.T.C. 488 (1973), aff'd in part, remanded in part, Civil No. 73-1754 (2d Cir. 1974); Baker & Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 VILL. L. REV. 517 (1962); Comment, Section 5 of the Federal Trade Commission Act—Unfairness to Consumers, 1972 WIS. L. REV. 1071 (1972); Austern, What Is "Unfair Advertising?", 26 FOOD, DRUG, COSMETIC L.J. 659 (1971); Note, The Pfizer Reasonable Basis Test—Fast Relief for Consumer But A Headache for Advertisers, 1973 DUKE L.J. 563; Note, Unfairness in Advertising: Pfizer, Inc., 59 VA. L. REV. 324 (1973). More recently the Commission has issued complaints against the three leading advertisers of non-description analgesic drugs alleging, inter alia, that it is an unfair act or practice to make performance, effectiveness, or side effects claims when there existed a "substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of such" claims. See, e.g., In re Bristol-Myers Co., No. 8917 (FTC, Feb. 23, 1973). Regardless of which of these legal theories is relied upon, it is the Commission's burden to establish the nature of the representations contained in the challenged advertising, whether they are explicit or implied. It is well established law that if an advertisement contains multiple representations, the advertiser may be held liable if any one of the material representations made is false, deceptive, or unfair. Rhodes Pharmaceutical Co. v. FTC, 348 U.S. 940 (1955). 7.

Some of the agencies or bodies with potential interest or jurisdiction in the field of image advertising are discussed in text accompanying notes 97-115 infra.

A. Industry's Tarnished Image

The role of industry in creating or abating pollution has been hotly debated in recent years. In a May 1970 survey, commissioned by Reader's Digest, 52 percent of the respondents rated pollution as the most or second most important domestic problem. Only the cost of living rated higher. 72 percent of the respondents placed "a great deal" of the responsibility for pollution on private industry. Almost half rated industry's pollution abatement efforts as "poor or very poor." Only 12 percent gave business good marks for combating pollution. Surprisingly, 83 percent said that they were willing to give up certain products to help solve pollution problems. A second Reader's Digest survey confirmed these results. More recently, an Opinion Research Corporation study found that 53 percent of the sample thought corporations were doing "very little" to control pollution—up from 41 percent only five years before. Significantly, 81 percent thought that plants which violate pollution laws should be closed, an increase from 70 percent five years before. A poll of business school students published in Business and Society in July, 1972, ranked 50 American corporations on their social responsibility. Utilities, oil companies, and steel companies were ranked low while banks and insurance companies were ranked high. Presumably the reputation of the former as polluters was a major factor. This latter poll indicates serious image problems for major corporations among potential employees. The recent "energy crisis" may worsen business' image; in a Gallup Poll at the


10. Trendex Public Issue Study Conducted for Reader's Digest (May, 1970). In this study, 70.9 percent of the respondents agreed with the statement, "Both air and water pollution are among the most serious problems facing America today." Approximately 35 percent thought the problem would be corrected by industry while 65 percent thought government legislation and political pressure by the public were more effective.


13. The FTC has recently charged the eight leading petroleum companies with an-
height of the "energy crisis," 25 percent of the people surveyed thought the oil companies were responsible for the crisis, slightly more than attributed responsibility to any other cause.\textsuperscript{14}

\section*{B. Image Advertising As Industry's Response}

Whether or not the image of industry with regard to environmental protection is in all cases deserved, many corporations have taken to defending themselves in corporate image environmental advertising. The \textit{Reader's Digest} survey, mentioned above, was used in the magazine's prospectus to promote an Advertising Supplement on the environment, which eventually appeared in its September, 1971 issue.\textsuperscript{15} Many magazines, including \textit{Fortune, Time, Newsweek, Barron's}, and \textit{The New Yorker}, have prepared extensive materials to justify corporate expenditures on image advertising and to encourage corporations to engage in image advertising.\textsuperscript{16}

It is important to gain some understanding of the nature and extent of image advertising; this, however, is a difficult term to define.\textsuperscript{17}
The Publishers Information Bureau (P.I.B.) and Leading National Advertisers (L.N.A.) both report on the amount of “General Promotion Advertising” found in most of the nation’s consumer magazines and newspaper supplements. Their definition of “General Promotion Advertising” includes advertising which is “devoted primarily to selling the corporate personality; its first objective goes beyond the direct sale of a single product or service.”18 While this definition indicates that the effects of an image advertisement may include the sale of products or services, it distinguishes General Promotion Advertising from brand and multi-brand advertising, political advertising, public service advertising, and association advertising. With these restrictions, the total billings for General Promotion Advertising in the 100 magazines covered by the report amounted to 68 million dollars for 1972.19 “Association advertising,” most of which promotes corporate image, added 23 million, for a total of 91 million dollars. Using somewhat different definitions and including amounts paid for broadcast and newspaper advertising results in figures ranging from the hundreds of millions all the way to one billion dollars.20


According to P.I.B., an image ad must fulfill one or more of the following purposes:

- It must educate, inform, or impress the public regarding the company’s policies, functions, facilities, objectives, ideals, and standards.
- It must build favorable opinion about the company by stressing the competence of the company’s management, its scientific knowhow, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes.
- It must build up the investment qualities of its securities, or improve the financial structure of the company.
- It must sell the company as a good place to work (and so is often designed to appeal to college graduates or to people of certain skills).

Another definition of image advertising, broader than the one used here, served as the basis for a major Industrial Marketing survey in 1967. The Industrial Marketing definition was, “Advertising in media, the prime audience of which is other than a direct influence on the purchase of a product or products, and the motive behind which is the projection of the corporate image (even though such advertising may be ‘product’ in nature).” Harding, Corporate vs. Product Advertising, Industrial Marketing, Sept. 1967, at 60. One of the ad agencies questioned in that survey proposed a definition which seemed to obliterate any distinction between corporate image and product advertising by defining the former as, “advertising conceived and placed on behalf of a total company with the prime objectives of creating a more favorable climate for the sale of all of the company’s products, present and future.” Id. at 61.


20. In compiling network and spot television expenditures, Broadcast Ad Reports does not use a formal definition for image advertising, but its coders are instructed to determine whether the public can consume the advertised entity. If it cannot, the ad is termed an “image advertisement.” Unlike P.I.B.-L.N.A., Broadcast Ad Reports includes public service advertising within the image category, but like the others, it does exclude political and association advertising. The resulting total cost for both corporate
The amount spent on image advertising is a controversial issue, particularly important to environmentalists, who are anxious to compare the amount spent on advertising pollution abatement with the amount spent on the abatement itself.21

Examples of image advertising are easy to find. One type is advertising which seeks to relate corporate activities or products directly to the corporation's sense of social responsibility, without at the same time describing any particular product or service of the company; examples are a paper company advertising that steps have been taken to minimize effluent discharges at one of its pulp mills or an auto manufacturer describing its efforts to produce a catalytic converter to reduce auto emissions. The emphasis in such advertisements is on the worth or reputation of the company, its employees, and therefore, all of its activities. These ads do not present—except very indirectly—arguments in favor of any particular position on a controversial public issue. Although the information contained in such advertisements may arguably have latent relevance to controversial public issues, that relevance is never made explicit.

It is important to distinguish "image advertising" from "public service advertising," in which a corporation addresses topics not directly related to corporate activities or products, such as a steel company advertising the benefits of the Girl Scouts or an oil company explaining the facts about marijuana. It can, of course, be argued that indirectly every corporation has an interest in every public or private activity or problem, the Girl Scouts and marijuana included. For example, use of marijuana may be a significant personnel problem which seriously affects corporate productivity. Similarly, the very fact that a corporation will speak out on such matters may reflect favorably on the corporation's sense of social responsibility. However, such advertisements are not corporate image advertisements in the sense here discussed, as they and association television advertising for 1972 was 161 million dollars. With magazine, radio, and outdoor advertising added, the total cost for corporate image advertising for 1972 was at least 267 million dollars. Other sources put the total expenditures much higher. For example, privately-owned utilities alone spent 300 million dollars on advertising in 1970. Federal Power Comm'n, Statistics of Privately-Owned Utilities in the U.S. in 1970 (1971). Much of this advertising promoted the image of utilities and thus could be included in the total. One critic of environmental advertising claims that the grand total, including product and utility advertising, is one billion dollars a year. Mander, supra note 2.

21. Debate on this question was especially heated in the phosphate pollution controversy, that is, whether expenditures by the detergent industry for development of a non-phosphate detergent were comparable to their advertising expenses for phosphate detergents. See Hearings on the Toxic Substances Control Act of 1971 and Amendment (S. 1478) Before the Subcomm. on Environment of the Senate Comm. on Commerce, 92d Cong., 1st Sess., ser. 92-50, pt. 2 (1972); Rukeyser, Fact and Foam in the Row Over Phosphates, Fortune, Jan. 1972, at 71.
do not describe the corporation itself but are more in the nature of editorials, which are unlikely to have the effect of corporate image advertisements and less likely to be deceptive.  

The definition of image advertising outlined above does not include all that may be called image advertising. It does, however, include most of the ads which have caused controversy. Although this article addresses only image advertising on environmental issues, the analysis also applies to advertising which focuses on issues such as minority rights, equal employment opportunity, and women's rights. Advertising by utilities raises distinct legal and policy issues.  

22. An advertisement describing the corporation might result in responses relating to the corporation itself while an editorial would be taken more as a statement of opinion, not leading to a response directly related to corporate activities. Statements of opinion are likely to be weighed by the viewer against other statements of opinion whereas claims regarding corporate activities are not readily comparable to or neutralized by competing claims. While many product advertisements now name their competitors and directly refute competing claims, environmental image advertising as yet stresses only the advertiser's virtues, without criticizing the environmental programs of its competitors.  


24. The issues raised by utility advertising are, for example, possible concurrent or preemptive jurisdiction by the Federal Power Commission or Atomic Energy Commission and conflicts in jurisdiction between these agencies and the local public service or utilities commissions. The propriety of a public utility advertising at all or advertising to increase consumption of scarce fuels or to cause other shifts in fuel consumption or use patterns, and then including the cost of such advertising in the utility's operating expenses, is a matter of extreme controversy and well beyond the scope of this article. However, it appears clear that at least a utility's promotional advertising—as distinct from image or public service advertising—is no more protected by the first amendment than is corporate product advertising. The best single source of information on the regulation of utilities' promotional advertising is Jerabek, A Survey of State Utility Regulatory Commissions: Initiatives Taken to Affect the Growth In Demand For Electric Power (July 1973), available from the Environmental Action Foundation, Room 720, Dupont Circle Building, Washington, D.C. 20036. See also Federal Power Comm'n, Promotional Practices of Public Utilities: A Survey of Recent Actions By State Regulatory Commissions, A Report to the Subcomm. on Regulatory Agencie, Select Comm. on Small Business (1970); E. Hirst, Electric Utility Advertising and the Environment, 1970, Oak Ridge Nat'l Lab., Nat'l Sci. Found. Environmental Program (an updated and expanded version of this report may soon be released); Sesser, Critics Say Utilities Worsen Power Problems by Pushing Electricity, Wall St. J., July 27, 1972, at 1, col. 8; Council on Economic Priorities, The Price of Power, Electric Utilities and the Environment, Economic Priorities Report (May-June 1972); L. Metcalf, Overcharge, ch. 9 (1967); Permar, A Legal Solution to the Electric Power Crisis: Controlling Demand Through Regulation of Advertising, Promotion, and Rate Structure, Environmental Affairs, Dec. 1971, at 670; Portfolios of The Electric Companies Advertising Program, available from N.W. Ayer & Son, Inc., 1345 Ave of the Americas, N.Y., N.Y. 10019 and The Electric Energy Ass'n, 90 Park Ave., N.Y., N.Y. 10016.  

The Environmental Action Foundation is serving as a clearinghouse of information on citizen challenges to electric utility policies, including promotional and image advertising. They have recently published a citizen's handbook on utility challenges, entitled,
Corporate image advertising thus defined has a long history. Often cited as the pioneering corporate advertising program, American Telephone and Telegraph Company began image advertising in 1908.25 Although this type of advertising was then far more likely to be called public-service or institutional advertising, its objective was then—as now—to make known and understood the purposes, problems, and policies of the telephone system. Streetcar companies advertised to teach the rules of the road and to allay prejudices against their companies. Railroads promoted “safety first.” During the wars, image advertising concentrated on interpreting the corporation’s role in the war effort. A trend was established; increasing amounts of image advertising have been disseminated since.

C. Image Advertising Analyzed

The purpose of corporate product advertising is clearly to promote sales and use of a particular product. Most product advertisements...
do not even mention the company producing the product, particularly where the same company also sells a number of very similar brands. But corporate *image* advertising concentrates heavily on the company name and has more complex purposes and effects, some of which can be identified relatively easily:

1. In the case of a company which sells products or components which are associated with its name, image advertising about corporate activities may favorably affect the sales of such products.27


Finally, for the single best bibliography of all of the above see *Amer. Marketing Ass'n, Images and Marketing* (1971).

27. For example, it has been shown that appeals to consumers’ concerns about the environment are effective. Kinnear, Taylor & Ahmed, *Ecologically Concerned Consumers: Who Are They?*, 38 J. OF MARKETING, Apr. 1974, at 20; Kinnear & Taylor, *The Effect of Ecological Concern on Brand Perceptions*, 10 J. OF MARKETING RESEARCH,
logos or tag lines maximize the association of the product with the image advertisement. Image advertising may prove especially important during recessions and shortages of particular products when it may not be appropriate to advertise the products directly. Studies of advertising before, during, and after the 1949, 1954, 1958, and 1961 recessions found that firms which did not cut their advertising budgets during these recessions did much better in sales and profits in the year following the recession than those which had cut their budgets.

2. Positive environmental image advertising encourages investment in the company by individuals, universities, foundations, mutual funds, and others whose concern for the environment may affect their investment decision. E.B. Weiss has stated that "a substantial percentage of corporate image advertising is intended, primarily or secondarily, to appeal to the financial community." Some investment groups may operate under an assumption that a company which pays close attention to environmental problems will also pay attention to the broad range of other factors which affect a company's long run profitability. However, there exists substantial controversy whether a socially responsible company is likely to be more profitable. Positive environmental image advertising may attract other investors, who would not wish to invest in a company which is likely to face expensive litigation with pollution control agencies or public interest groups, which may have to in-


The importance of the environmental aspect of corporate activity to investors was recognized in 1971 by the SEC. In that year, it promulgated a release requiring disclosure to investors when compliance with environmental protection statutes may necessitate significant capital outlays, may materially affect the earning power of the business, or cause material change in the business being carried out or intended to be carried out. Securities Act Release No. 5170, Exchange Act Release No. 9252 (July 19, 1971), CCH Securities Law Reporter ¶ 78,150, as amended, Securities Act Release No. 5386 (May 9, 1973).


stall new equipment for pollution it has caused or is causing, or which may suffer adverse environmental publicity.

Aside from these conventional investment considerations, some investors may simply wish to invest in more socially responsible companies when all other considerations are equal—and perhaps even when they are not. In this regard, some universities and foundations have experienced severe pressure from students and other activists to consider the environmental record of companies before investing in them. Similarly, some mutual funds express in their prospectuses particular policies regarding the social responsibility of companies in which they invest. A committee of the Investment Company Institute, a group which promotes the interest of mutual funds, declared recently that "issues of corporate responsibility should . . . be considered investment issues."

In terms of investment decisions some surveys have shown that security analysts and others who manage or influence the flow of investment dollars believe that corporate advertising favorably affects security values, that corporate advertising has led them to look into companies as investments, and that those who have looked into companies as a result of corporate advertising have gone on to invest in the companies.

32. It is important to note that concern with their reputation in the financial community . . . is one of the reasons most frequently given privately, but least mentioned publicly, for launching corporate campaigns . . . [because a] company which announced it was embarking upon corporate advertising because it wanted to influence its stock price upward would be certain to attract unwelcome attention from the Securities and Exchange Commission. So they don't say that.

They know, however, that a high price/earnings ratio will put them in a favorable position for further expansion through acquisition or merger, since most such arrangements are based upon exchange of stock.


35. ERDOS & MORGAN SURVEY FOR BARRON'S MAGAZINE ON CORPORATE ADVERTISING FROM 1970, THE IMPACT OF CORPORATE ADVERTISING ON THE INSTITUTIONAL MONEY MANAGER (1971). A questionnaire was sent to 278 subscribers of BARRON'S who managed or influenced the flow of corporate funds. The results found that 87.2 percent an-
3. Corporate image advertising may favorably impress prospective or existing employees who wish to work for a company which has shown concern rather than disdain for the environment. Image advertising may be particularly important in attracting students who have attended the larger and more politically active campuses, which are prime recruiting areas for many corporations. Companies are also responding to the prospective employee's concern about his own working conditions since a company's air pollution may affect its employees' health more than anyone else's. The positive effects of image advertising on recruitment are documented by many case histories showing dramatic increases in inquiries about employment with a corporation after it has engaged in an image advertising campaign.  

4. Banks, insurance companies, and other financial institutions take image into account in providing their services to corporations. Such financial sources may be hesitant to insure or lend money to a company that pollutes, especially if expensive litigation or casualty claims may later result.

5. Through image advertising corporations also seek to influence the attitudes of their shareholders; the hope is that image advertising will mitigate dissatisfaction with corporate policies.

6. Purchasing agents may be inclined to purchase from a company with a known sense of social responsibility. Recent studies indicate that "an unknown supplier may make more effective use of his advertising budget by spending most of his money on institutional advertising" rather than product advertising. "The preference towards institutional advertisements . . . can be attributed to decision makers' interests in the capabilities of prospective suppliers." This conclusion answered yes to the question, "In your opinion, does 'Corporate Image' advertising favorably affect the company's security values?" 82.1 percent stated that corporate advertising had "served to call [their] attention to a company as an investment potential," and 79.3 percent of the latter stated that they had gone on to purchase the securities.

See also Thomas E. Ryan, Inc., Measuring Brokerage Firm Advertising Effectiveness (Time Magazine study, conducted in 1968).

36. Communicating the Total Corporate Personality, supra note 25 at 27 (3,000 letters received regarding employment after eleven individual magazine ads). See also Strategic Advertising and Attitudes Toward Corporations and Measuring Strategic Advertising Effectiveness, supra note 26 (recruitment recommendation measurement, id. at 31). For examples of recruitment ads see Time Magazine, Strategic Advertising 97-99.


7. Finally, a host of other factors may influence a corporation's choice to engage in image advertising. Some image advertising serves as an "ego trip" for the company's officers by putting them and their company in the limelight.

This enumeration of benefits achieved through image advertising is by no means exhaustive. It is clear from this recital, however, that most corporate image advertising has the same goal as traditional product advertising—increased profits. In each case the company attempts by its image advertising to gain the support of groups and individuals whose favorable attitudes improve profits and whose distrust or enmity erodes them. One survey of the motivation of companies which engage in corporate image advertising found that, of the advertisers surveyed, 55 percent engaged in image advertising to improve consumer relations, 47 percent to improve product sales, 46 percent to improve general trading relations, and 64 percent to improve stockholder/financial relations.39

However, in addition to these clearly economic and commercial benefits, political motivation is involved in certain types of corporate image ads. Thus, in the same survey, 11.4 percent of the respondents stated their prime objective to be improvement of governmental relations. Presumably, the corporations hope to use image advertising to influence regulatory or legislative bodies which can act in ways adverse to the company's financial interests. Politically motivated image advertising, directed towards governmental bodies or the electorate, is easily distinguished from that aimed at investors or consumers. The former identifies and discusses specific legislative proposals by name or reference and often calls upon the reader to take political action. In contrast, a commercially motivated image ad describes the corporation and its activities with the intention of arousing favorable action directed towards the corporation itself, not towards the legislature. The fact that the corporation's activities may be controversial—and perhaps the subject of proposed or existing government regulation—does not detract from the commercial emphasis of such an advertisement that is aimed at stimulating the purchase of corporate products or stock.

39. Are Public Relations Executives Becoming More Involved with Corporate Advertising, PUBLIC RELATIONS J., Nov. 1973, at 28. For 1972 survey results, see Are Public Relations Executives Becoming More Involved with Corporate Advertising, PUBLIC RELATIONS J., Nov. 1972, at 24 (prime objective of image advertising is improvement of consumer relations: 31.5 percent; improvement of stockholder/financial relations: 23.5 percent; improvement of product sales: 19.2 percent; improvement of trade relations: 8.9 percent).
It is interesting to note that corporations rarely if ever fail to take a business expense tax deduction for their image advertising, even though the Internal Revenue Code states that no deduction can be taken for messages run "in connection with any attempt to influence the general public . . . with respect to legislative matters. . . ."40 The possible consequences of this practice are discussed below.41

D. The Resulting Controversy

A disturbing aspect of corporate image environmental advertisements is the apparent assumption that creating an appearance of environmental consciousness is an adequate substitute for positive action. In other words, many corporations seem to feel that their sole task is to advertise their concern rather than to take action. One critic claims that "most of industry still sees pollution and environment questions as more of a public relations problem—in other words, an image problem—than as anything fundamentally related to the way they are doing business."42 The noted advertising columnist E.B. Weiss seems to agree with this contention. Weiss has commented that "the gap between corporate claims and performance is at least as sizeable as the generation gap—and that's a whopper. . . . [T]he total disregard for the role the corporation played in bringing about some of our major ecological problems has genuine 'Alice-in-Wonderland' characteristics."43 Because of the corporations' myopic and misleading treatment of environmental matters, the Council on Economic Priorities concludes in its report Corporate Advertising and the Environment (1971) that some advertisements "subtly co-opt . . . the public's right to free and informed decision-making in this area of vital concern."44

These criticisms are being taken seriously in Congress. In the last Congress, Senators Spong, Baker, Bayh, Dole, Muskie, and Randolph introduced S. 927, which would make it a criminal act subject to fine and imprisonment for any person knowingly to make "any false or deceptive statement, representation or claim in advertising a product, service, system, or device of any kind or description with respect to the ability of the product, service, system, or device to prevent or control" air or water pollution.45 One of the sponsors' reasons for proposing the bill was that "many industries apparently are placing more emphasis

41. See text accompanying notes 104-05, 108, infra.
42. Mander, supra note 3, at 45. He also claims that advertising "now owns the word 'ecology.'" Id.
43. Weiss, Management: Don't Kid the Public with Those Noble Ads, Advertising Age, Aug. 3, 1970, at 35.
44. Corporate Advertising and the Environment, supra note 9, at 13.
on advertising their abatement activities than they are on abatement itself. The advertisements in some cases are worse than misleading—they are not even truthful." More recently, in its original form, S. 2176, the "Truth-In-Energy Bill" would have banned all advertising "encouraging increased energy consumption." Conceivably this bill would have banned many corporate image environmental campaigns.

E. Petitions to the Federal Trade Commission

The Federal Trade Commission has received many criticisms of environmental advertising, in part because of its heightened visibility in the regulation of unfair product and deceptive advertising. Public reference can be made only to some of these complaints—those in which the complainant issued a press release or otherwise publicized his petition. Aside from complainant-initiated publicity, complaints to the FTC are, of course, confidential.

In a press release on July 9, 1971, the Center for Science in the Public Interest forwarded a Caterpillar Tractor Company advertisement which had appeared in Time and Business Week claiming that the Interstate Highway System saved lives and should therefore be completed without delay. In a press release dated August 1, 1971, Senator Philip Hart sent to the Commission an advertisement by Bethlehem Steel Corporation regarding its efforts to restore its strip-mined lands.

49. Schoenfeld, FTC's New Boldness Tests Limits of its Authority, 3 Nat'l J. 207 (1971); Gardner, Attacks on Advertising Continue as Agencies Work on New Regulatory Policies, 4 Nat'l J. 1427 (1972); Gardner, Presidential Veto of Pipeline Bill Threatened Despite Fuel Shortage, 5 Nat'l J. 1693 (1973) (regarding FTC Improvement Act rider on Alaska Pipeline bill which grants expanded power to the FTC).
50. Press release from Dr. James Sullivan, Center for Science in the Public Interest, 1779 Church Street, N.W., Washington, D.C. 20036. See Debunking Madison Avenue, Environmental Action, July 24, 1971; and Corporate Advertising and the Environment, supra note 9, at 27.
On May 12, 1972, a group called Public Action to Protect Environmental Resources (P.A.P.E.R.) announced that it was sending the FTC a complaint about an advertisement by Potlatch Forests, Inc., regarding its commitment to pollution control on the Clear Water River and an ad by St. Regis Paper Company concerning installation of pollution control equipment at its pulp and paper mills. In October 1972, Senator Mike Gravel sent a complaint to the FTC regarding an advertisement by Westinghouse Corporation on its breeder reactor program. On January 31, 1973, Citizens for a Better Environment issued a press release with a copy of a complaint it had filed with the FTC concerning advertisements by Commonwealth Edison Company in Chicago about its environmental program. Then on April 4, 1973, the Center for Science in the Public Interest again petitioned the FTC, this time regarding a Chrysler Corporation advertisement appearing in the Washington Post on September 26, 1972, February 13, 1973, and March 13, 1973, and elsewhere, entitled "Thirty Handy Facts On Safety, Highways, and Emissions" quoting from the Administrator of the Federal Highway Administration regarding the cost of the 1975-76 emission requirements of the Clean Air Act. On November 21, 1973, Senator Thomas McIntyre sent a complaint to the FTC regarding advertising by the petroleum industry about the energy shortage.

---

52. Press release of May 12, 1972, by P.A.P.E.R., Suite 1915, One Rockefeller Plaza, N.Y., N.Y., with a copy of letter of May 12, 1972, to The Honorable Miles W. Kirkpatrick. See also Advertising 1972, supra note 2; Columbia Law Students Ask FTC Action on "Polluters", ADVERTISING AGE, May 15, 1972, at 102. For favorable commentary on the St. Regis advertising program see Trees Pay Off for St. Regis, INDUSTRIAL MARKETING, Dec. 1967, at 38; St. Regis/Time, a case study by TIME.


The Deputy Administrator of the Environmental Protection Agency, John R. Quarles, sent a letter on November 29, 1973 to the Chairman of the FTC, Lewis S. Engman, regarding two newspaper ads by PPG Industries, Inc., claiming that EPA regulations reducing the amount of lead in gasoline would waste crude oil. On January 9, 1974, Congressman Benjamin Rosenthal, along with five colleagues, filed a petition to commence a rulemaking proceeding to require substantiation of environmental ads, 16 examples of which were attached to the petition. Finally, on January 18, 1974, Russell Train, EPA Administrator, complained about an advertisement by a Chevrolet dealer association regarding relaxation of emission control standards.

All complaints received by the FTC, except for those directed to a specific Commissioner or individual staff member, are referred by the Office of the Secretary to the division responsible for the subject of the complaint. Corporate image advertising would normally be referred for review, investigation, and response to either the Division of National Advertising or the Division of Marketing Practices, both in the Bureau of Consumer Protection. Citizens can also petition the FTC to initiate an investigation or rulemaking proceeding. Specific investigations

---


58. Press release, Office of Congressman Benjamin Rosenthal, Jan. 9, 1974. See Shifrin, FTC Urged to Act on 'Misleading' Energy Crisis Ads, Wash. Post, Jan. 10, 1974, at A14, col. 7; Revett, Oilmen Rip Bid for Proof on Energy Ads, Advertising Age, Jan. 14, 1974, at 1. In response to the Rosenthal petition, Mobil Oil Corp. filed a Memorandum in Opposition on April 4, 1974, arguing that the FTC should not extend its advertising substantiation resolution to cover Mobil's corporate image ads. A major contention of Mobil was that such action by the FTC would further bar the access of Mobil to the media to express its views. In the case of CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) the Supreme Court had held that the networks could refuse paid editorial advertisements by individuals and organizations.


60. By statute the FTC is not empowered to assist an individual in a purely private dispute, but may both refer the matter to agencies which may do so and review the complaint for possible violations of law warranting Commission action. 16 C.F.R. § 2.3 (1974). The best summary of the Commission's procedures in handling complaints is Staff Notice 18, Sept. 21, 1973, which was forwarded to Senator Henry Jackson in response to an inquiry regarding the Commission's handling of congressional correspondence.

61. 16 C.F.R. §§ 2.1, 2.2 (investigations), 1.15 (rulemaking proceedings) (1974).
are undertaken by staff attorneys and can lead to staff recommendations that the Commission issue a proposed complaint. After allowing for consent negotiations, a formal complaint may then be issued, resulting in a formal adjudicative hearing conducted by an Administrative Law judge. The hearing decision can be appealed to the Commission and subsequently in the federal courts. This procedure is obviously very costly and time consuming. As a result, many cases are settled with consent agreements prior to the commencement or completion of the adjudicative hearing.

Adjudicative and rulemaking proceedings do not depend only on the receipt of consumer complaints or petitions. In fact, the Commission responded to criticisms that it was overly dependent on a "mail-bag" development of policy by establishing an Office of Policy, Planning, and Evaluation directly responsible to the Commission itself. In addition, the individual bureaus within the Commission have developed a system of Analytical Policy Guides to assist each Bureau in the detailed formulation of policy and programs. The Commission has successfully asserted its power to engage in substantive rulemaking, a procedure especially well suited to policy formulation.

62. Id. § 2.31.
63. Id. §§ 2.33, 2.34.
64. Id. §§ 3.1-3.46.
65. Id. §§ 3.52-3.55.
67. The delay frequently inherent in FTC proceedings has been a prime source of criticism of the agency's effectiveness; see note 69 infra.
68. See, e.g., In re ITT Continental (Profile Bread), 79 F.T.C. 248, 253, 3 Trade Reg. Rep. ¶ 19,681, 21,727 (FTC 1971).
The Commission, under section 6(b) of the FTC Act,\textsuperscript{73} can require the advertiser to submit material in substantiation of its claims; such material has frequently been made public by the FTC. Unsatisfactory substantiation can serve as the basis for a formal complaint.\textsuperscript{74}

The FTC has so far taken no public action on the environmental advertising complaints mentioned above, nor has it publicly enunciated a policy on corporate image environmental advertising. However, the present Chairman of the FTC, Lewis S. Engman, stated in a speech on February 15, 1974: “To the extent that [image] ads, like product ads, seek to encourage, or do, in fact, encourage economic responses from consumers or businessmen—to that extent, they are subjects of legitimate interest to the Federal Trade Commission.”\textsuperscript{75} The legal and policy issues raised by FTC action in this area are discussed below.

II

IMAGE ADVERTISING AND THE FIRST AMENDMENT

Central to any discussion of whether the Commission may assert jurisdiction over image advertising is whether the first amendment’s guarantee of freedom of speech protects these advertisements from regulation or whether image advertising is a form of “commercial speech” and thus unprotected by the first amendment.\textsuperscript{76}

and Administrative Procedure Reform, 118 U. PA. L. REV. 485 (1970). There are even some pressures on federal agencies to require rulemaking proceedings when they are changing established policy; see NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Bell Aerospace Co. v. NLRB, 475 F.2d 485 (1973), aff’d in part and rev’d in part, 94 S. Ct. 1757 (1974); United Fed. of College Teachers v. Miller, 479 F.2d 1074 (1973). However, SEC v. Chenery Corp. (Chenery II), 332 U.S. 194 (1947), makes it clear that “[t]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.” \textit{Id.} at 203. This position was reaffirmed by the Supreme Court in Bell Aerospace, supra.

75. Address by FTC Chairman Lewis S. Engman before the Antitrust Law Society, State Bar of Mich., Feb. 15, 1974. See “Image” Ads Protected as Free Speech, \textit{Engman Says, Advertising Age}, Feb. 18, 1974, at 1 (the title is not wholly accurate; Chairman Engman stated only that, in a close case, any doubts as to whether an ad was protected as free speech should be resolved in favor of the advertiser, not that all image ads were protected); Lawmakers Irked by FTC “Image” Stance, \textit{Advertising Age}, Feb. 25, 1974, at 8.
76. The only law review article which discusses the first amendment in relation to corporate image advertising assumes—contrary to the following analysis—that image advertising does \textit{not} affect economic decisions of consumers since it does not “discuss the product or service itself” and, therefore, corporate image advertising is protected by
Several points must be considered in distinguishing commercial from protected speech. First, the mere fact that a message takes the form of a paid advertisement is insufficient to render the message commercial. In New York Times Co. v. Sullivan, the Court barred a libel action based on statements regarding police brutality made in a paid advertisement and held that such advertisement was protected by the first amendment. The advertisement was held to retain first amendment protection because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."78

Secondly, the fact that a message involves economic interests or is impelled by profit motives does not necessarily negate first amendment protection. In Ginzburg v. United States, the Court stated that "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." Similarly, in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., the incidental economic impact of the railroads' lobbying campaign was held insufficient to "transform" such campaign into an activity regulable under the Sherman Act.

Thirdly, the mere fact that an advertisement deals with matters of public importance and controversy does not render it immune from regulation. In the case of Capital Broadcasting v. Mitchell, the Supreme Court affirmed the judgment of a three-judge court that the first

The Supreme Court has apparently never directly held that corporations not engaged in the business of communication, e.g. newspapers, are accorded first amendment rights. See generally First National Bank of Boston v. Attorney General, 290 N.E.2d 526 (Mass. 1972) (law barring corporate expenditures to influence vote on referendums held unconstitutional); Corporate Freedom of Speech, 7 Suffolk Univ. L. Rev. 1117 (1973); But cf. Thomas v. Collins, 323 U.S. 516, 531 (1945) (that organization is one engaged in business activities does not resolve question of application of first amendment); compare Smyth v. Ames, 169 U.S. 466, 522 (1898) (corporations are "persons" within the meaning of the due process clause of the fourteenth amendment) with Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1899) (corporations are not "citizens" within meaning of the privileges and immunities clause).

amendment rights of cigarette advertisers were not violated by a law banning all television cigarette advertisements, despite the fact that cigarette advertising had earlier been held to state one side of a controversial subject of public importance under the fairness doctrine. In Capital Broadcasting the lone dissenter, Judge J. Skelly Wright, objected only to the fact that cigarette ads were banned outright but thought that selective regulation of cigarette ads short of a ban was constitutional. Similarly, in Pittsburgh Press Co. v. Pittsburgh Comm.


The Federal Communications Commission has recently defined the type of corporate image ads to which the fairness doctrine may apply. On July 18, 1974, the FCC published the results of its "broad-ranging inquiry into the efficacy of the fairness doctrine . . ." Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26372 (1974). In that release the Commission stated that "institutional advertising . . . designed to present a favorable public image of a particular corporation or industry . . . ordinarily does not involve debate on public issue [unless . . . the advertiser seek[s] to play an obvious and meaningful role in public debate." 39 Fed. Reg. 26380 (emphasis supplied). As an example of an institutional ad not raising fairness obligation the Commission cited Anthony R. Martin-Trigona, 19 F.C.C.2d 620 (1969) (passing reference to school prayers does not amount to advocacy) and as an example of institutional ads which did raise such obligation is cited Wilderness Society (ESSO), 30 F.C.C.2d 643 (1971), reconsideration denied, 31 F.C.C.2d 729 (1971), reconsideration denied, 32 F.C.C.2d 714 (1971), (ads arguing that the nation's urgent need for oil necessitated a rapid development of oil reserves on Alaska's North Slope and referring to ESSO's ability to build a pipeline in the Arctic while "preserving the ecology" inherently raised and had a cognizable bearing on the controversial issue of construction of an Alaska oil pipeline despite the fact that the pipeline controversy was not specifically referred to). In determining whether the fairness doctrine applies to an ad, the Commission begins by considering whether the advertisement "is an obvious participation in public debate," not by undertaking a "subjective judgment as to the advertiser's actual intentions . . . If the ad bears only a tenuous relationship to that debate, or one drawn by unnecessary inference . . . the fairness doctrine would clearly not be applicable." 39 Fed. Reg. 26381. "[I]f the arguments and views expressed in the ad closely parallel the major arguments advanced by partisans on one side or the other of a public debate, it might be reasonable to conclude that one side of the issue involved had been presented thereby raising fairness doctrine obligations. See, e.g. Media Access Project (Georgia Power), 44 F.C.C.2d 755, 761 (1973)" (Power company ads proclaiming company's benevolent air and water pollution policies held not controversial while ads asserting the need for an increase in generating capacity and the inadequacy of prevailing rates did advocate one side of a rate-increase issue then pending before the state utility commission).

The FCC's statement on the fairness doctrine is inapposite to the position advocated by numerous public interest spokesmen. See, e.g., Neckritz, et al, Ecological Pornography and the Mass Media, 1 ECOLOGY L.Q. 374 (1971) and a suit filed by the authors against the Federal Communications Commission: Neckritz v. FCC, 502 F.2d 411 (D.C. Cir. 1974).

on Human Relations, the Supreme Court found the newspaper's claim that commercial advertising serves as a medium for "exchange of information" insufficient to "abrogate the distinction between commercial and other speech." The mere fact that the subject matter of an allegedly defamatory statement is a matter of "public or general concern" has recently been held by the Supreme Court to be insufficient to bar a defamation action in Gertz v. Robert Welch, Inc.

The leading Supreme Court decision denying first amendment protection to commercial speech is Valentine v. Chrestensen. In this case a municipal ordinance forbidding dissemination of printed handbills containing advertising was upheld, even though convictions of distributors of religious and political handbills had earlier been reversed. The handbills in question were termed "purely commercial advertising" with respect to which the ordinance was valid, despite the fact that on the opposite side from the commercial message the distributor had printed a political protest. This holding has been reiterated with approval, both by the Supreme Court and lower courts. Although the
Chrestensen doctrine has been criticized,\textsuperscript{90} it has recently been cited with approval by the Supreme Court in the \textit{Pittsburgh Press Co.} case involving placement of want ads in sex-designated columns.\textsuperscript{91}

There has emerged no clear constitutional test to distinguish commercial from protected advertising. The circumstances and content of each individual advertisement must be analyzed to determine whether or not it is protected. In each of the major Supreme Court cases touching on the subject, the classification of the ad in question did not raise the subtle questions which would have required a close analysis. However, analogies can be drawn from some cases involving commercial speech and from other areas of first amendment law to support the conclusion that the \textit{effects} of an advertisement will determine its constitutional status. \textit{Pittsburgh Press} speaks in terms of the sex designations for the want ads as having the "practical effect" of an "overly discriminatory want ad."\textsuperscript{92} Similarly, in \textit{Noerr}, the Court cited the success of the railroads' lobbying campaign to support its conclusion that the campaign was in fact directed towards influencing legislation.\textsuperscript{93} The effects of speech have long been the focus in first amendment analysis of "fighting words."\textsuperscript{94} Likewise, the extent of an employer's free speech in labor disputes is regulated according to its effects,\textsuperscript{95} as is a broadcaster's right to disseminate information on lotteries.\textsuperscript{96}

In determining the effect of speech, the courts have frequently looked to the identity and purpose of the speaker. In \textit{New York Times}, the Court emphasized that the sponsor of the ad was a "movement whose existence and objectives are matters of the highest public interest and concern."\textsuperscript{97} Similarly in \textit{Murdock v. Pennsylvania},\textsuperscript{98} in overturning the convictions of Jehovah's Witnesses who had been arrested under a statute requiring a licensing fee for solicitors, the Court emphasized the petitioners' religious beliefs. The advertiser's purpose,


\textsuperscript{91} See note 84 supra.

\textsuperscript{92} Id. at 388.

\textsuperscript{93} 365 U.S. at 144.

\textsuperscript{94} \textit{See}, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Gooding v. Wilson, 405 U.S. 518, 524 (1972).


\textsuperscript{96} New York State Broadcasters Ass'n v. United States, 414 F.2d 990 (2d Cir. 1969), \textit{cert. denied}, 396 U.S. 1061 (1970).

\textsuperscript{97} 376 U.S. at 266.

\textsuperscript{98} 319 U.S. 105, 109 (1943).
like the identity of the speaker, is a “persuasive interpreter” of “equivocal conduct.” In both *Murdock* and *Ginzburg* the advertiser’s motive was a factor considered by the Court in classifying the challenged speech.

Where the effects of the speech or the purpose of the speaker are mixed, there is some authority for regulating any separable commercial statements or for regulating the speech where the “dominant” effect or purpose of the advertisement is commercial. Advertisers cannot evade regulation by merely appending a “moral or civic platitude” to an otherwise clearly commercial advertisement. Even an advertisement entitled to first amendment protection may lose that protection if it contains statements made with reckless disregard of the truth. In the context of libel and invasion of privacy the Supreme Court has extended first amendment protection except where a statement is published with “‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” Arguments can be made for extending this exception to deceptive advertising cases.

99. Chrestensen v. Valentine, 122 F.2d 511, 518 n.7 (2d Cir. 1941) (Frank, J., dissenting).

Although *New York Times Co. v. Sullivan*, supra note 89, is sometimes cited as holding purpose “immaterial,” the profit motive held immaterial was that of the medium (i.e., the New York Times), not the sponsor of the ad. As the *Times* Court recognized, to deny protection to an ad, merely because a newspaper profits from its placement, would severely limit the rights of individual speakers who cannot afford to buy a printing press. 376 U.S. at 266. *But cf. Radish*, supra note 90.

100. 319 U.S. at 109; 383 U.S. at 471.

101. *See Pittsburgh Press Co.*, supra, 413 U.S. at 388 (sex-designated column headings were not “sufficiently dissociate[d] from the want ads placed beneath [them]” to make the placement severable for first amendment purposes from the want ads themselves); Chrestensen v. Valentine, 122 F.2d 511, 520, (2d Cir. 1941) (Frank, J., dissenting), *rev’d on other grounds*, 316 U.S. 52 (1941) (regulation of commercial claim constitutional if it does not “so inextricably penetrate [attached political appeal] so as to make fission impossible or impracticable”); Kois v. Wisconsin, 408 U.S. 229, 231 (1972) (“a quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.”)


105. In *Ragano v. Time, Inc.*, 302 F. Supp. 1005 (M.D. Fla. 1969) the failure to indicate whether statements were fact or opinion, when known to be opinion and not
The courts appear to have acknowledged the expertise of regulatory agencies in determining whether messages cross the line between protected speech and speech that can be regulated.\textsuperscript{108} There is some authority for the FTC's power to make factual inquiries in order to determine whether the first amendment is applicable.\textsuperscript{107} However, if there are no reasonable grounds for believing that such inquiries will find the advertisements unprotected, then even these may be barred.\textsuperscript{108}

III

A POLICY BASIS FOR REGULATION

A. The FTC Role

Assuming the FTC is not barred by the first amendment from regulating a given image advertisement, a question remains as to whether the FTC should, as a matter of policy, exercise such regulatory authority.

The Commission's role, in its broadest sense, is regulation of economic relationships. Specifically, its intended function is the correction and cure of imbalances in economic relationships brought about by unfairness or deception. The Commission's mandate is not defined by its past practices. It was clearly stated in a recent Supreme Court decision that the Commission's mandate is to be developed from those "public values" that constantly change, adopting new forms and applications.\textsuperscript{109} The Commission's jurisdiction is limited by statute to entities "organized to carry on business for its profit or that of its members."\textsuperscript{110} Therefore it would not be appropriate for the FTC to attempt to regulate image advertising by, for example, the Friends of the Earth,\textsuperscript{111} which has in fact run ads on off-shore drilling.\textsuperscript{112}


\textsuperscript{109} FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).


\textsuperscript{111} Community Blood Bank of the Kansas City Area, Inc. v. FTC, 405 F.2d 1011 (8th Cir. 1969) (nonprofit association held exempt from jurisdiction); and Rogers v. FTC, 492 F.2d 228 (9th Cir. 1974), cert. denied, 43 U.S.L.W. 3209 (October 15, 1974) (Commission determination not to regulate campaign claims of opponents of anti-litter measure upheld).

\textsuperscript{112} See, e.g., Oil Companies Have Spent Millions Defending Offshore Drilling: For 50¢ You Can See What It Costs The Earth—And You, The New Yorker, August 12, 1972, at 79 (F.O.E. Advertisement).
Any businessman who uses false or unfair advertising to sell a product directly to a consumer is creating an imbalance in the economic relationship he enjoys with consumers of that product. No one doubts that the Commission can and should correct that imbalance. The Commission should also be able to regulate image advertising which indirectly has the same effect. Most corporations enjoy a series of economic relationships beyond the narrow but important relationships with retail consumers of their products. It can be argued that corporations should not be permitted indirectly to bring about an imbalance in any of these relationships through the use of false or unfair advertisements about their own environmental policies, just as they could not do so by false product advertising.

In a number of contexts the Commission has already recognized its interest in regulating advertising claims regarding characteristics of the manufacturer, as distinct from claims regarding its products. For example, in FTC v. Armour & Co. and Farmers' Cooperative Fertilizer Co.,\textsuperscript{113} the Commission issued a complaint against Armour for its failure to disclose its ownership of the fertilizer company. The Commission's order requiring Armour to disclose that fact was evidently intended to aid consumers not desiring to deal with monopolists. On similar grounds the Commission required one company to cease falsely claiming that its products were "union made."\textsuperscript{114} Another company was ordered to cease using the name Blind Weavers, Inc., which misleadingly implied that its products were made by the blind.\textsuperscript{115} Most recently, in Ex-Cell-O Corp.,\textsuperscript{116} the Commission accepted a consent settlement barring alleged deception in a claim that milk cartons were biodegradable.

Assuming that a justiciable case is developed and litigated, the resulting remedy may be no more than a cease and desist order. Requiring the disclosure of material facts or corrective advertising would increase the benefit of a successful Commission proceeding.\textsuperscript{117} It should

\textsuperscript{113} 1 F.T.C. 430 (1919).
\textsuperscript{115} 22 F.T.C. 145 (1936).
\textsuperscript{116} 82 F.T.C. 36 (1973).
\textsuperscript{117} On the corrective advertising remedy, see Thain, Corrective Advertising: Theory and Cases, 19 N.Y. L. Forum 1 (1973); Note, Federal Trade Commission and the Corrective Advertising Order, 6 U. San Fran. L. Rev. 367 (1972); Comment, Corrective Advertising: The FTC's New Formula for Effective Relief, 50 Tex. L. Rev. 312 (1972); Comment, Corrective Advertising—The New Response to Consumer Protection, 72 Colum. L. Rev. 415 (1972); Note, Corrective Advertising and the FTC: No Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways, 10 Mich. L. Rev. 374 (1971); Note, "Corrective Advertising" Order of the FTC, 85 Harv. L. Rev. 477 (1971). For cases involving corrective advertising, see ITT Continental Baking Co. (Wonder Bread), 3 Trade Reg. Rep. 20,464 (Final Order to Cease and Desist, Oct. 19, 1973; appeal pending); Firestone Tire & Rubber Co., 81 F.T.C. 398 (1973); aff'd, 481
be noted that the much discussed notion of counter advertising—free advertising time to counter paid advertising—has no direct relationship to corrective advertising, which may be the remedy resulting from a litigated Federal Trade Commission proceeding. The timing of any order entered may affect the utility of corrective advertising, since the topic advertised may have diminished in public importance in the meantime. This objection can be met by proceeding against claims regarding long-term corporate programs with respect to which the public has more than a transitory interest. The Commission has recently been given broad powers to enjoin advertising which it reasonably believes to be false or unfair. Finally, a Commission proceeding will, as a result of the Commission's broad subpoena powers, bring to the public record information invaluable to the public's understanding of environmental issues. It is possible that the FTC could request substantiation of claims even if no litigation were contemplated.

B. Alternatives to the FTC as a Forum

The vast majority of corporate image advertising will go unregulated if jurisdiction is not asserted by the Federal Trade Commission. Although there is some private regulation of image advertising, it is not likely to be extensive or effective. According to news releases by two environmental groups, the National Advertising Review Board, the industry's self-regulating body, has recently received two complaints about environmentally oriented ads. One of these, filed by


121. This does not include Sen. McIntyre's petition, mentioned in note 56 supra.
CORPORATE IMAGE ADVERTISING

P.A.P.E.R. in March, 1973, concerned ads disseminated by the Weyerhaeuser Company on the environmental impact of clearcutting. The other, filed by an editor of the Environment Action Bulletin, objected to ads of the Investor-Owned Electric Light and Power Companies, an association of 75 power companies, concerning radiation emitted from nuclear power plants. The latter petition has recently been acted upon by the NARB, though the result was a very narrow order.

Federal agencies other than the FTC may have a limited role in the regulation of image advertising. The SEC can regulate advertising which constitutes an "offering" of stock to the public or constitutes a "manipulative or deceptive device" which affects the price of a stock being traded. The Food and Drug Administration and the Federal Trade Commission have a working agreement to avoid duplication and promote uniformity, as both agencies have responsibilities to regulate food, drugs, devices, and cosmetics.

If most of the image advertisements go unregulated or are ineffectively regulated, then one must consider whether the claims made in image environmental advertising will go unchallenged altogether. In this regard, one must note the Supreme Court's recent denial of a first amendment right to media access for counter advertisements in CBS v. Democratic National Committee. Appeals to the Federal Communications Commission under the "fairness doctrine" for the presenta-


124. NARB Press Release, Six Cases Involving National Advertising Resolved by NAD During July, NARB Reports, Aug. 10, 1973. The complaint concerned the relative effects of background radiation and radiation released by nuclear power plants; the order barred discussion of the effect of radioactivity on successive generations of human beings. The advertiser was allowed to convey facts about radioactivity in other contexts.

125. Under the Securities Act of 1933, 15 U.S.C. §§ 77a et seq. (1970), the SEC may regulate "offers" of securities for sale by a corporation. Almost any communication may be considered an "offer." See Release No. 33-38442, Oct. 4, 1957, 22 Fed. Reg. 8359 (1957). No offer may be made unless a registration statement has been filed with the SEC. Between the time it is filed and the time it is approved, offers may be made only if they include the prospectus filed with the SEC. After it is approved, the prospectus must accompany the offer. The result is that an advertisement might be considered an offer which violates the Act if a registration statement had not at least been filed. Securities Act of 1933, 15 U.S.C. §§ 77(b) and 77(e). See Securities Exchange Act of 1934, § 10(b) and Rule 10b-5; SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971).

126. Working Agreement Between FTC and Food and Drug Administration, 3 CCH TRADE REG. REP. ¶¶ 9850.01-.03, at 17,675-77 (June 9, 1954).

tion of alternate viewpoints have succeeded in the case of advertising, most notably cigarette advertising. The right to rebuttal time, however, arises only with respect to statements regarding a "controversial issue of public importance." Most television image advertisements do not address such issues. In fact, it is the policy of the major networks to reject advertisements to which the fairness doctrine may apply. To the extent that controversial image ads are aired for which no fairness doctrine appeal applies, one must rely on the controversial nature of the ad itself to arouse its own rebuttal in other forums.

As an alternative to regulation, it is possible that the Internal Revenue Service could challenge the legality of a business deduction taken for the cost of some image ads. Section 162(e)(2)(B) of the Internal Revenue Code denies a business expense deduction for advertising "in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums." The Treasury Regulations further define this provision to include "carrying on propaganda . . . for the promotion or defeat of legislation." The regulations allow deductions for "institutional or 'good will' advertising which keeps the taxpayer's name before the public . . . provided the expenditures are related to the patronage the taxpayer might reasonably expect in the future." Specifically, "expenditures for advertising which presents views on economic, financial, so-

130. INT. REV. CODE OF 1954, § 162(e)(2)(B). The question of the deductibility of corporate image advertisements has been explored in two days of hearings on Corporate Energy and Environmental Advertising, May 6 and July 18, 1974, by the Subcomm. on Environment, Senate Commerce Committee. The Committee commissioned Lester Fant to prepare a study of the Internal Revenue Code as it applies to corporate image advertising. In Mr. Fant's testimony he interpreted the term "legislative matter" to refer to matters which are appropriately the subject of legislation; an advertisement can relate to a "legislative matter" and therefore be an inappropriate subject for a deduction even though no legislation is pending with respect to the subject of the advertisement. Release of Testimony of Lester Fant, at 17. As to the terms "attempt to influence," Mr. Fant would find the cost of any advertisement which presents only one side of an issue—as distinct from a purely educational format fairly presenting all factors which support both sides of an issue—as non-deductible. Such ads need not directly urge the public to contact legislators. Mr. Fant reasoned that any advertisement which generates concern about legislative matters has the effect of causing the public to contact its representatives. Id. at 18-20. See generally, Kuttner, Oil, Utility Firms' Deductions Queried, Wash. Post, May 7, 1974, at A4, col. 1.
cial, or other subjects of a general nature” are deductible. Not deductible is any advertising “to influence the public with respect to the desirability or undesirability of proposed legislation,” or which urges or encourages the public in this respect.

The vagueness of this provision and these regulations has required court interpretations, notably in *Consumers Power Co. v. United States.* In that case, business expense deductions by one backer of the Electric Company Advertising Program were disallowed for advertisements which directly and indirectly attacked public ownership of power companies, such as TVA. However, deductions were also disallowed for ads which merely “suggested that private power companies can provide faster service because, unlike with publicly owned power companies, there was no waiting to have funds appropriated for the needed electrical facilities.” The court rejected arguments by the power companies that a part of the deduction should be allowed where only a single sentence in the ad related to government-operated utilities.

If present deductions for many corporate image advertisements ought to be disallowed, but the Internal Revenue Service fails to take such action, serious questions arise as to whether a taxpayer or shareholder would have standing to sue the IRS to force it to deny deductions. It would be especially ironic for a shareholder to sue, given the fact that the deduction benefits the corporation. However, a shareholder could claim he is protecting the corporation from penalties and interest which could occur if the deduction were improperly claimed. Furthermore, a shareholder may be the only person able to compel disclosure by the corporation of what deductions have been taken. It must be noted that just as the corporation’s taking a business expense deduction is evidence that the advertisement is commercial speech, therefore not protected by the first amendment, denial of a deduction under Section 162(e)(2)(B) may be evidence that it is protected.

Although any rational policy determination as to how best to allocate scarce Commission expenditures must take these factors into ac-

---

133. 427 F.2d at 79.
count, the viability of such alternatives cannot alleviate the need for
the FTC to chart its own course in this controversial and complex area.

CONCLUSION

The controversy aroused by corporate image environmental ad-
verting continues unabated and, with the energy shortages, has sub-
stantially increased. The pressure on the Federal Trade Commission
to take action regarding particular image ads has, as a result, also in-
creased. However, such pressures and the passions which generate
them should not be allowed to hurry the Commission into taking precip-
itous action which may infringe upon the first amendment freedoms of
corporations, regardless of the inaccuracy or offensiveness of their ad-
vertising claims. On the other hand, there is strong evidence of the
impact of image advertising on commercial relationships, including re-
tail sales. Widespread public interest in the claims challenged and the
novelty of the legal questions raised by such challenges will continue
to make the Federal Trade Commission’s response to the call for the
regulation of image advertising a topic of significant interest to the
public generally as well as to environmentalists.