Perspectives

on current developments

"Junk" Telephone Calls

One objective of advertising has always been to reach the greatest number of people at the lowest cost. However, as the amount and variety of advertising have increased, the conflict between "the right to free speech" and "the right to privacy" has become a subject of considerable debate. The latest—and, to many, the most irritating—method of direct advertising is the Automated Dialer and Recorded Message Player (ADRMP), the source of many so-called "junk" telephone calls. This machine (first marketed in 1976) can automatically dial up to 1,000 phones a day, deliver a prerecorded message, and record a response. It can dial sequential as well as preselected numbers, so that even unlisted phones are not protected. Not surprisingly, with an estimated 7 million "live" sales calls already being made each business day, the prospect of automatic telephone solicitation shows signs of being the straw to break the public's back.

In response to a petition filed last year requesting an inquiry into the possible regulation of unsolicited automated calls, the Federal Communications Commission received more than 1,000 comments "overwhelmingly in favor of either an outright ban or severe restrictions." In the meantime, bills to regulate unsolicited calls have been introduced in both the House and the Senate. The proposed Telephone Privacy Act (H.R. 9505 and S. 2193) would enable telephone subscribers to inform their phone companies that they do not wish to receive unsolicited commercial telephone calls. Advertisers would then be prohibited from dialing the numbers of these subscribers and could be fined or imprisoned for repeated violations. Even calls to subscribers who have not barred them would be limited to one minute if made entirely by automated equipment. The act would, however, exempt from regulation all unsolicited calls from political organizations, religious charities, public opinion pollsters, media rating companies, and so on.

As is always the case when regulation of speech is involved, constitutional arguments have played a large part in discussions of the proposed FCC regulations and the proposed Telephone Privacy Act. And—again as is always the case—both sides have tended to overstate the strength of their respective positions. The opponents of regulation point to the Supreme Court's recent holding that commercial speech enjoys First Amendment protection—announced in the much noted case that invalidated state prohibitions on the advertising of prescription drug prices. That case, however, involved total suppression of the speech in question rather than (the issue involved in these proposals) regulation of the manner of its utterance. Even constitutionally protected speech of the most preferred sort—for example, political speech—is subject to reasonable regulation as to time, place, and manner. (Thus, we need not permit our residential neighborhoods to be invaded by sound trucks every other November.) To say the government cannot prohibit ordinary commercial speech is a far cry from saying it cannot prohibit the direction of that speech toward persons who have said they do not wish to be bothered.

On the other hand, the proponents of regulation point (too confidently) to the Supreme Court's validation of somewhat similar laws enabling a homeowner to demand that a mailer of sex-oriented material cease sending him advertisements. But regulation of soft-core pornography is as far removed from regulation of other commercial activity as the latter is from the regulation of political speech; the Court's determination of what is "reasonable" regulation can scarcely be expected to be the same in both fields. Different types of speech enjoy, one might say, different degrees of immunity from governmental interference. The Court long ago invalidated a city ordinance prohibiting door-to-door distribution of handbills, insofar as that ordinance applied to the distribution of religious tracts by Jehovah's Witnesses, though it later upheld a similar ordinance as applied to a magazine salesman.

It may be expected, however, that the First Amendment objections to the proposed regulation would not be sustained by the courts. If the regulation is adopted, the real constitutional battleground may well be not the First Amendment but the Constitution's equal protection clause, which forbids disparate treatment of similarly situated individuals. Why, it will be argued, should telephone solicitation by ADRMP be subjected to restrictions that are not applied to the equally intrusive (though more expensive) solicitation by a "boiler room" of live callers? And why should media polls but not other product polls be exempted from the homeowner's power to exclude? Attacks against commercial regulation on equal protection grounds have been notably unsuccessful in recent years, but it may be that the "free speech" context of the present dispute will encourage closer judicial scrutiny.

The proposals for dealing with ADRMP through FCC regulation raise, in addition, the unresolved legal issue of that agency's power to control calls within a single state. Its charter runs only to "interstate communications," but it can (and will) be argued that interstate activities that use facilities common to both intrastate and interstate communications are subject to FCC regulation to a sufficient extent to support the proposals. Of course a question that logically should come first in this regard is why federal regulation *should* be extended to intrastate calls. All of the states have telephone regulatory agencies already in place, and these can address the intrastate aspects of the ADRMP problem if they wish. The response of the proponents to this—if it is a response—is that the force of inertia (or the lobbying power of the telephone companies) is much greater at the state level.

The increase in the numbers and societal influence of lawyers—often noted in the pages of *Regulation* and elsewhere—is understandable when one considers the basic issue of free speech, privacy, and federalism that a relatively simple regulatory proposal such as this can present. Moreover, the very complexity of the legal issues and the uncertainty regarding their resolution encourages the trend towards increased delegation of authority to the agencies. Maximum flexibility can be retained and adverse judicial decisions most readily accommodated if the details are left to the FCC. And —to complete the circle—the decision to leave details to the FCC in turn cedes more power to the courts, which will be more ready to hold unconstitutional the details devised by an agency than the considered judgments of the Congress itself.

Helping Smokers Make "Better" Decisions?

Even though statistics show that cigarette smoking strongly increases the chances of developing heart disease, cancer, emphysema, and bronchitis, Americans purchased 626.7 billion cigarettes in 1976—a little more than eleven per day for each person eighteen years and older. Many policy-makers, guided by the assumption that most people would rather not smoke than risk premature death, attribute widespread cigarette smoking to lack of information. Hence the government has trumpeted the perils of smoking in an effort to help consumers make "better" choices—that is, smoke fewer cigarettes. But other policy-makers, pointing to the increase in per capita cigarette consumption since the record low of 1970, contend that consumers refuse to act on available information even when it is in their best interests to do so. Those who hold this view argue that government should guarantee "better" choices by limiting the number of places where smoking is allowed or by making the habit considerably more expensive than it is now.

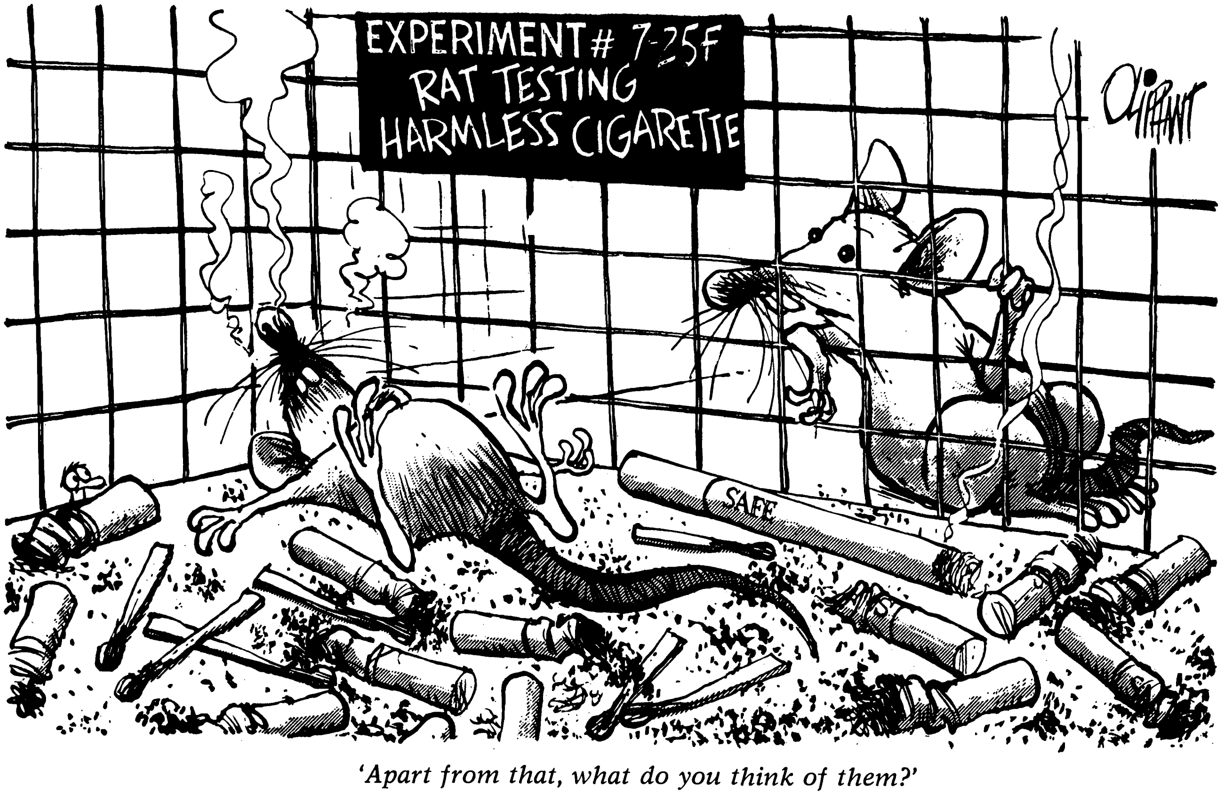
Secretary of Health, Education, and Welfare Joseph Califano has said (before a House subcommittee, February 15, 1978) that his department would follow an educational approach: "Our primary goal is to provide information and conduct research that will enhance, not reduce, personal choice. If citizens are given all the facts . . . and they still do not wish to give up a personal habit, then, except for protecting the rights of nonsmokers, I think government can properly do no more." Califano has also said (before the National Interagency Council on Smoking and Health, January 11, 1978) that government *can* do much more to "improve" consumer choice. He has asked Secretary of the Treasury Michael Blumenthal to help establish an interdepartmental task force to consider a graduated federal excise tax for cigarettes, with rates directly related to "tar," nicotine, and carbon monoxide levels. He has even suggested that the federal government might best aid personal choice by imposing maximum allowable levels for these agents. Finally, he has persuaded Federal Trade Commission Chairman Michael Pertschuk to consider altering cigarette package warnings to increase their impact on smokers.

The more extreme elements of Califano's crusade can be found in the Disease Prevention and Health Promotion Act of 1978 (S. 3115), introduced by Senator Edward Kennedy (Democrat, Massachusetts) in May 1978. Title IV of the act would attack cigarette consumption on three fronts.

First, it would ban smoking in all enclosed public areas in federal buildings, except in dining facilities, recreation rooms, and lounges, where smokers and nonsmokers would only have to be separated. It would also require that smoking and nonsmoking federal employees be separated whenever feasible. The idea is to protect the right of the nonsmoker and to reduce cigarette consumption by rendering the habit socially unacceptable.

Second, Title IV would require the secretary of HEW to levy a federal "health protection tax" on imported or U.S.-made cigarettes, the rates scaled to toxicity: the more "tar" and nicotine in the cigarette, the stiffer the tax. (For particularly "dirty" cigarettes, it would reach 50 cents a pack compared to the current tax, unchanged since 1951, of 8 cents.) Presumably this tax would "protect" the smoker's health by prompting him or her to consume fewer cigarettes and by encouraging manufacturers to market less toxic products.

Third, Title IV would require cigarette producers to specify "tar" and nicotine contents on the package in milligrams and would replace the surgeon general's usual admonishment with ten new warnings, each to appear on 10 percent of all cigarette packages. Instead of the familiar "Cigarette smoking is dangerous to your health," smokers would encounter such statements as "Cancer of the lungs, mouth and throat may result from cigarette smoking," or "Cigarette smoking during pregnancy may damage the unborn child," or "Smoker's cough is an early sign of lung damage." The argument is that a variety of warn-



'Apart from that, what do you think of them?'

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ing labels would be more effective than the single statement consumers have long since dismissed as routine.

Both Califano and Kennedy may have had Sweden in mind when they expressed a desire to strengthen warning label requirements. In early 1977, the Swedish government developed sixteen warning labels that cigarette manufacturers must rotate on an annual basis and Swedish law now stipulates that package labels list "tar," nicotine, and carbon monoxide levels. Although there is as yet no conclusive evidence on the impact of these and other regulations on smoking habits in Sweden, per capita cigarette consumption there declined last year for the first time since World War II.

The recent campaign against cigarette smoking as "public enemy number one" has raised the ire of numerous commentators, some of the public and, of course, the Tobacco Institute. The degree to which the federal government can persuade or coerce individuals to act in their own "best interests" without encroaching on personal liberties is a matter of serious debate. Those with a stake in cigarette sales—especially the 400,000 tobacco farmers and 45,700 cigarette workers—and those who fear for their personal liberties may combine to block anything like the proposed measures. On the other hand, a recent study by Dr. Gio B. Gori of the National Cancer Institute concluded that low-toxicity cigarettes can be consumed more safely than other cigarettes and may even, if the consumption is limited, be relatively "safe." Consequently, measures requiring cigarette packages to contain "tar" and nicotine information or taxing cigarettes according to toxicity may gain credibility with those who want the public to make "better" decisions.

The Social Performance Index and Corporate Responsibility

It was in a speech last fall that Secretary of Commerce Juanita Kreps first announced publicly that the Commerce Department intended to develop a way of measuring the degree to which corporations pursue "socially desirable" goals. Despite heated criticism from the business community, she reiterated the idea in a January statement before the House Committee on Appropriations.

If the Department of Commerce goes ahead with the idea, it would collect data and publish the results in the form of a "Social Performance Index" (SPI) that ranked the performance of individual corporations. The SPI program would cover, among other things, a corporation's performance in controlling environmental pollution, taking "affirmative action," buying goods and services from minority vendors, resolving consumer complaints, and testing its products.

Proponents argue that the SPI would partly counteract pressure for "public accountability" and the increased regulation that would go with it. They argue, further, that the corporation that becomes more socially responsible would also become more profitable.

Whether high or improved SPI scores would translate into high or improved earnings (as well as increased costs) is a matter for speculation. One piece of hard evidence comes from examining the record of the Dreyfus Third Century Fund, a mutual fund that invests in companies "contributing to the enhancement of the quality of life." If supporters of the SPI were correct, buyers of mutual fund shares would prefer funds that explicitly favored "socially responsible" companies, since profits in those companies would be growing. But between 1973 and 1976 the numbers of shareholders fell 20 percent for Third Century compared to only 14 percent for all mutual funds (measured by a composite index of approximately 400 mutual funds). On the other hand, during this period, the value of Third Century's net assets (measured in constant dollars) fell by less than the average—13 percent versus 20 percent. Thus, the evidence is contradictory.

One explanation for this may be that, while acting in a "socially responsible" manner—*and advertising that fact*—appears to some firms to be an effective means of stimulating demand, the costs of such a marketing strategy can be significant. Reducing air pollution, for example, requires either the installation of new equipment or changes in the production process (which also may require new equipment). Usually, therefore, the buyer who chooses a more "socially responsible" vendor will pay a higher price for a product than the buyer who chooses a lower-cost, less "socially responsible" vendor. This tends to make it difficult for one firm or a small number of firms in an industry to act "socially responsible." Companies that do are likely to find their competitive position dissipated.

Some economists have noted that the causes of what may be perceived as socially "irresponsible" corporate behavior are much more fundamental than many people think and have to do with property rights (broadly defined) or else with inefficient (or ineffective) regulation. Taking our previous example, these economists would argue that the problem of excess air pollution can be handled by determining who has rights to use the air being polluted or by instituting taxes, fees, or penalties for its use. In either case, *all* users—private enterprises, as well as state and local governments—should have an incentive to modify their behavior.

Whatever the ultimate fate of the SPI program, it must be viewed within the context of rising calls for "corporate accountability." SPI would appear to be only the tip of the iceberg.

Vacuuming the Ocean Floor

The largest deposits of minerals on this planet rest as potato-shaped nodules on the bottoms of the deepest oceans. Containing mostly iron and manganese, plus usable amounts of more valuable metals such as copper, cobalt, and nickel, these nodules range in size from small pellets to cannon balls. Though they have been known to exist for more than a century, the development of complex technologies to vacuum them to the surface began only a decade ago. A combination of factors—primarily declining ore grades from land sources, more stringent environmental restrictions, and political instability in Chile (copper) and Zaire (cobalt)—has now raised prices of metals sufficiently to make ocean mining (or vacuuming) viable.

The issue of ocean mining has become a bargaining chip in the gigantic 150-nation United Nations Conference on the Law of the Sea that has been underway since 1967. This conference grew out of widespread apprehension over the stepped-up march of ocean "enclosures" by coastal nations, beginning in 1945. As offshore hydrocarbons and offshore fisheries increased in value, coastal states began to extend jurisdiction for economic purposes over adjacent continental-shelf areas (in some cases out to 200 or more miles, no matter where the shelf ended). This was contrary to traditional "freedom of the seas" and to the more recent notion that the deep seas and their mineral resources ought to be the "common heritage of mankind"—subject, of course, to the exclusive control of an international authority.

In the Conference on the Law of the Sea, the proposal for an international authority received support from nations of all kinds—from poor countries who saw in it the potential for wealth redistribution or for the UN's financial independence, to land-locked countries and those with only indirect access to the high seas, to maritime powers concerned with the post-1945 extension (from three miles to twelve miles) of coastal state claims to the territorial seas (waters adjacent to the coastline within which governments assert almost sovereign control). The concern of the maritime powers arises from the fact that a universal twelve-mile territorial sea would overlap 121 international straits and could thus subject ships to tolls and other restrictions imposed by coastal nations. To avoid this, the maritime powers had to offer something of value to the countries that constitute a majority of the conference (younger developing countries and land-based mineral producing countries). What the majority demanded was a seabed authority modeled after the UN General Assembly.

Through a gradual series of concessions, the United States has, in effect, come to endorse many of the positions favored by the majority. Thus, the United States has

—agreed to—in fact, has proposed—the creation of an international seabed authority;

—agreed in principle to an internationally owned "enterprise" to mine the seabeds for that authority;

—endorsed provisions to limit the number of seabed sites exploited by private firms;

—endorsed the concept of "temporary" production controls—provided they last for no more than twenty-five years (so as to protect the foreign exchange earnings of land-based producers);

—suggested it might transfer privately owned technologies to the international seabed authority, although it is unclear whether this would be done on commercial terms; and

—agreed to help finance the international mining enterprise so that it would be able to get into operation concurrently with private firms (otherwise, allegedly, it would not be ready to operate until after some of the best deposits were already mined).

In exchange for these concessions, the United States has demanded a reasonable guarantee that private firms (particularly U.S. firms) would have rights to mine concurrently with the enterprise and, as an additional guarantee, that the advanced-technology countries would have virtual veto power over the authority's decisions. Representatives of the other view have accepted each U.S. concession while resisting all of the important U.S. demands.

As a result, U.S. ocean miners have been arguing since 1973 that the United States should enact temporary legislation to regulate their activities until a satisfactory treaty can be negotiated, adopted, and ratified by the U.S. Senate. The miners' rationale for the recently passed House bill (H.R. 3350, cosponsored by Representatives John Breaux, Democrat of Louisiana, and John Murphy, Democrat of New York) is that unless they are given exclusive and enforced rights to deposits, new entrants will jump their claims. Economists have questioned this view. They point out that the number of mine sites is large relative to the number of potential miners and that the maps, samples, photographs, and other confidential data concerning ore assays and the nature of seabed terrain can be obtained only by prospecting. Prospecting amounts to a trade secret that can be protected without patents inasmuch as poachers usually cannot filch the secret by observing the movements of their competitors' ships and dredges. Miners will thus ordinarily have incentives to spread out and search independently. The stronger and more recent motive behind the bill would appear to be the miners' concern about the direction of the Law of the Sea negotiations.

The protections embodied in H.R. 3350 are a mixed bag so far as economic efficiency is concerned. For example, particular tracts would be granted on a first-come first-served basis, but work requirements would be imposed that would tend to reduce entry, and a "grandfather" clause would attempt to ensure property rights even when a treaty had been ratified. Also, seabed miners would be taxed at 0.75 percent of the market value of minerals mined in order to create a special fund for development assistance, thus giving some tangible substance to the concept of "common heritage." The Carter administration refuses to support an ocean mining bill that does not contain a revenue sharing provision of this sort.

Treaty proponents maintain that domestic legislation and outright mining by U.S.-led consortia would make it difficult to consummate the Law of the Sea negotiations. In their opinion, for the United States to begin mining the alleged "common heritage" before the international mining enterprise is launched would so anger the countries in the majority that a precious opportunity to negotiate a comprehensive treaty would be gone forever. Supporters of H.R. 3350 maintain their approach would provide better resource allocation than the most likely Law of the Sea treaty. They also maintain that the bill's enactment would strengthen the hand of the U.S. delegation. Finally, they maintain that the absence of a treaty per se would have the ultimate benefit of preventing the creation of an inherently inefficient system of regulation—the kind of system that would stem from acknowledging an international organization as the sole authority in the exploitation of deep sea minerals.

The FTC's Eyeglass Rule

It used to be illegal in some states and localities to advertise eyeglasses and eye examinations. No longer. On May 24, 1978 the Federal Trade Commission adopted a final regulation on the advertising of ophthalmic goods and services that, among other things, invalidates state laws prohibiting such advertising. Specifically, the rule declares that it is an unfair practice for states to enforce restrictions against advertising except for the purpose of preventing unfairness or deception. The rule raises a number of important issues concerning the FTC's authority to adopt regulations that define "unfair or deceptive acts or practices" under Section 5 of the Federal Trade Commission Act. Three are especially important: (1) the FTC's definition of "unfairness," (2) the FTC's approach to required affirmative disclosure as a prerequisite to nondeceptive advertising, and (3) the FTC's authority to preempt state laws.

The definition of unfairness. Much ink has been spilled by the commission, the courts, and commentators defining the concept of "unfairness," with most of the ink-spilling designed to ensure that the statutory standard is as broad as the commission declares it to be. In the statement of basis and purpose accompanying the eyeglass rule, the commission announced a nonexclusive two-fold test for unfairness: (1) do the practices cause "substantial harm to consumers"? and (2) do the practices "offend public policy"?

The commission found that the answer to the first test was "yes" since both economic theory and empirical evidence demonstrated that advertising restrictions cause "higher prices, lower rates of consumption by the poor and the elderly, and lower frequency of eye examinations." Assertions of countervailing benefits from the restrictions were rejected as having little support in the rulemaking record. The commission ruled that the answer to the second question was also "yes" in light of recent Supreme Court decisions holding that "the consumer's right to receive price information is protected by the first amendment."

In concluding that bans on advertising are "unfair," the commission relied heavily on free-market economics. The commission's report states that free markets promote consumer well-being, that they are presumptively "fairer" than regulated markets, and that "the commission's responsibility to promote the efficient functioning of markets has relevance to its interpretation of its mandate to act against 'unfair or deceptive acts or practices' as well as against 'unfair methods of competition.'" According to this view, demonstrable impediments to economic efficiency provide half the basis for declaring a practice illegal.

Further revealing its view of unfairness, the FTC rejected the argument that advertising restrictions, if illegal at all, are not "unfair acts or practices" but instances of "unfair methods of competition." To the commission "the distinction between 'unfair acts or practices' and 'unfair methods of competition' rests on the victims of the injury. . . . If the action injures competitors or the competitive system, it is an unfair or deceptive act or practice."

The commission's view of illegality under Section 5 of its act as set forth in the eyeglass rule could influence the conduct and results of future FTC proceedings in several ways. First, the commission appears to invite the submission of information on the effects of its actions where "unfairness" is alleged and suggests it will be guided toward results that promote the consumer's economic welfare. By adopting the presumption that this welfare can be promoted by free markets, the commission puts itself in the position of having to show why markets are currently failing and what can be done to repair them. Second, the commission seems to concede, as many of its critics have observed, that classes of conduct that constitute "unfair methods of competition" do not involve injury to consumers. Presumably, illegality may arise where consumers are unaffected or even economically benefited by the conduct being challenged as an "unfair method of competition." Logically, does not this approach to Section 5 raise the question whether the commission's own declaration that certain conduct is unfair competition (because it injures competitors even though it helps consumers) might itself become an unfair practice (because the declaration injures consumers)?

Affirmative disclosures to prevent deception. Another issue raised by the eyeglass rule is whether states may replace advertising restrictions with requirements that advertisements contain various "affirmative disclosures." The commission's statement acknowledges a potential problem in this area.

> Disclosure requirements can increase advertising costs and discourage advertising altogether. Numerous parties to this proceeding contended that if permitted, States would circumvent the [FTC's] rule by indirectly prohibiting advertising through the imposition of burdensome disclosure requirements which were unnecessary to deter deceptive or unfair advertising.

To address this problem, the rule permits states to adopt specified affirmative disclosure requirements and to propose others, but outlaws those requirements not having FTC approval. Unfortunately, the commission's statement does not explain why certain provisions for mandatory disclosures are allowed and others are not, nor how great the "increased advertising costs" must be to trigger commission concern, nor what formula is to be used to weigh the consumer injury from insufficient information against the potential injury from deception or unfair advertising. For example, the commission does not say whether it would approve numerous and burdensome affirmative disclosure requirements when the petitioning state could show that a small minority of consumers might be misled by the absence of any one of those requirements.

Even less clear is the type of proof that the FTC will regard as adequate to demonstrate whether mandatory disclosure provides net benefits to consumers. Since the statement itself gives little guidance on these questions, it is likely that the FTC will attempt to convince the courts that, because of "agency expertise," these questions of law (that is, the standard for making a decision) and fact (that is, proof of consumer cost or benefits) are immune from judicial scrutiny.

FTC authority to preempt state law. A primary objective of the eyeglass rule is to invalidate state laws and regulations that impose restrictions on advertising. This presents a direct conflict between FTC and state authority. The FTC's power to preempt state laws was hotly contested in the proceeding, just as it has been in proceedings related to several other pending commission rules.

The bulk of the FTC's reasoning on the preemption question is contained in an appendix that cites judicial precedents and deals at length with the legislative history of recent amendments to the Federal Trade Commission Act. The commission concludes that the question of preemption depends not upon general theories of federalism, but rather upon the meaning and intended scope of that act.

Noticeable in its absence is any reliance on recent cases that have dealt with the subject of "state action" as an exemption to the antitrust laws. But this body of case law, which has received much Supreme Court attention in recent years, defines the circumstances under which state officials or private persons, acting in accordance with state laws, can be found in violation of the Sherman and Clayton acts. In the FTC's view, the cases are apparently not pertinent to an interpretation of the Federal Trade Commission Act. Since the Sherman and Clayton act decisions provide immunity for many state regulations that arguably benefit producers and injure consumers, the commission's reading of the Federal Trade Commission Act provides an alternative basis for invalidating these regulations. That act, however, unlike the Sherman and Clayton acts, cannot be used by private plaintiffs. Thus, the preemption authority does not automatically jeopardize local regulations in the absence of an express declaration by the FTC to that effect in the context of a particular proceeding.

If the commission's eyeglass rule is sustained by the courts, its effects as a precedent may be significant in addressing several recurring issues. First, the commission has endorsed a market-oriented approach to consumer welfare. Second, it has declared that promoting consumer economic welfare is a goal of Section 5's otherwise vague prohibition against "unfair" acts or practices. Third, it has recognized (but not precisely delineated the ways) that required affirmative disclosures regulating commercial speech may make that speech more costly, thereby effectively reducing its quantity —to the detriment of consumer welfare. Finally, it has concluded that the FTC Act may preempt state laws that are inconsistent with official interpretations of Section 5, thus opening the door for selective administrative deregulation of locally regulated industries.

Regulating Funerals

Choosing to delve into a matter that most of us prefer not to think about, the Federal Trade Commission is now considering a staff proposal to regulate the funeral industry.

Analytically, the provisions of the staff's proposal for a final rule fall into two groups: those that would decrease and those that would increase restraints on the market for funeral services. In the first group are provisions that would prohibit market restraints that have resulted largely from trade association and state licensing procedures, as well as from the industry's "rules of ethics." These include restraints on the advertising of prices, on selling funerals to consumers in advance, and on operating memorial societies (nonprofit voluntary associations that help their members get information and make arrangements for funerals). The FTC's rule would make it illegal for any funeral director to continue to engage in these restraints in any way—through boycotts, threats, disparagement, or the misuse of licensing boards.

The commission staff argues that restraints of this sort tend to increase consumer "search costs" and create a kind of monopoly power that can be exploited by individual morticians. For example, advertising prohibitions make it more difficult for consumers to undertake comparative shopping and less necessary for sellers to compete on the basis of price. Similarly, restraints on the advance selling of funerals (often the result of prohibitions on the solicitation of business) reduce competition in the industry by making it more difficult for consumers to search for the type of funeral they want and to compare prices before the time when pressure and grief make search more difficult. As for memorial societies, the commission staff has found cases where state boards have threatened to revoke licenses of funeral directors who cooperate with them.

The second group of provisions would increase market restraints by imposing detailed requirements designed to force disclosure of price and other information by funeral directors. For example, funeral directors would be required to give price information in response to telephone requests and to disclose that caskets can be obtained in colors different from those displayed (this in response to evidence that some funeral directors display cheaper coffins in unattractive colors so as to discourage their purchase). In addition, funeral directors would be forced to disclose the fees that they charge for cash advances paid to third parties (florists, musicians, pallbearers, and the like). Also, it would be unlawful for funeral directors to disparage inexpensive merchandise or the arranger's concern for price—undoubtedly a difficult provision to enforce.

Even more important, in the view of the FTC staff, is the requirement that funeral directors provide individuals making personal inquiries with itemized lists of prices for the various components of a funeral, rather than prices for predesigned funeral packages only. There appear to be two main reasons for this. One is to give consumers flexibility in designing the elements of the funeral that they want. The other is to require funeral directors to provide nonconventional funeral alternatives—including, for example, alternative containers (a nonmetal receptacle or enclosure made of cardboard, pressed-wood, canvas, or other material that is less expensive than a casket and strong enough to hold and transport human remains). The price-list provision in effect requires funeral homes to stock these alternative containers. Some argue that this could easily result in higher overhead costs (if consumers do not desire nonconventional funerals) or higher than necessary prices (if such funerals might be more efficiently handled by specialist firms).

In addition, the staff proposal addresses itself to specific industry practices that allegedly take advantage of grief-stricken survivors. For example, funeral directors would be forbidden from embalming or taking possession of remains without permission, and would be required to release remains upon request. (According to the industry, this would place funeral directors in a difficult position if family members disagreed over such practices, particularly in the case of embalming, which must be done quickly or not at all.) Also, crematories would be prohibited from requiring caskets for cremation and required to provide alternate containers, if desired.

This staff proposal, in contrast to the FTC's final eyeglass rule (see this issue, page 9) reveals relatively little confidence that a market, once free of restraints, will work well enough to allow consumers to protect themselves. No doubt the additional regulations in group two would protect some consumers, albeit at a cost. Whether consumers would want to incur that cost, given the choice, is difficult to say.

EPA Requires Pretreatment of Industrial Effluents

Obviously, pollutants discharged directly into surface water should be subject to controls. But what about industrial pollutants discharged into municipal sewage systems? The Water Pollution Control Act Amendments of 1972 required the Environmental Protection Agency to establish standards limiting the permissible discharges from various industrial processes into lakes, rivers, and streams, and also (by way of special "pretreatment standards") into municipal sewer systems. Under the amendments, the pretreatment standards must do two things: (1) protect the municipal treatment systems from damage and (2) prevent the discharge of pollutants that "pass through" the municipal plant without being properly treated.

EPA has wrestled with its pretreatment policy for over five years. Protecting municipal treatment systems from damage is a fairly straightforward task, but preventing "pass through" is not. There are two problems.

One is the question of the standard. Does an effluent "pass through" a municipal plant if 50 percent of the pollutant is removed before discharge into the river? Or 70 percent?

The other problem is the matter of policing the standard. Since municipal treatment plants that discharge into surface waters must obtain an EPA permit and are subject to federal limitations, one suggestion was to control the total outflow from municipal plants and focus the standards on ensuring that the regular treatment operations were not damaged. But critics objected that this approach would let industries escape federal controls by discharging effluents into large municipal systems where their individual pollutants would be lost in the much larger sewage flow. Agreeing with the critics, EPA chose to apply extensive controls over industrial contributors to municipal systems. The pretreatment regulations it issued on June 26, 1978, require industrial plants to meet numerical limitations similar to those imposed on direct discharges into surface waters, subject only to a credit to the extent that the municipal systems consistently remove a portion of the pollutant before its ultimate discharge into surface waters. Since many plants send all their liquid effluents through municipal sewer systems, these regulations represent something like a doubling of EPA's control over industrial water pollution.

EPA has announced that it will confine its limitations to certain industrial categories considered to present the worst pollution problems. Even so, it estimates that as many as 38,000 to 55,000 dischargers will have to comply with the new regulations. In an attempt to lessen its own administrative burden, EPA is seeking to have states and larger municipalities assume responsibility for the enforcement of its standards. Whether this will work is doubtful. One suspects that many states and municipalities will decline the offer and that EPA, strapped for funds and personnel, will not be up to the task. In short, there is likely to be a large gap between the sweeping requirements of the regulation and compliance.

The Communications Act of 1978

For two years the House Subcommittee on Communications has been reworking the 1934 statute that created the Federal Communications Commission. The new draft—now complete in the form of the proposed Communications Act of 1978 (H.R. 13015)—changes the focus of the law by supporting regulation of communications only "to the extent marketplace forces are deficient" and by treating it as a supplement to, rather than a replacement for, competition. According to the bill's cosponsors—subcommittee chairman Lionel Van Deerlin (Democrat, California) and ranking minority member Louis Frey (Republican, Florida)—the 1934 act not only was designed for a nation with an immature telecommunications network, but also failed to anticipate the technological changes that have made parts of the network more competitive. The changes include the development of cable TV and the growth of firms providing alternatives to AT&T equipment and services.

Some of the proposal's major provisions would: (1) reshape the FCC into a smaller (and weaker) Communications Regulatory Commission (CRC), (2) deregulate cable television, (3) eliminate many restrictions on radio and television stations (and, therefore on networks), but impose license fees to help cover the costs of regulation, and (4) permit AT&T to expand into new areas, but eventually require it to divest itself of Western Electric.

Reshaping the FCC. Administratively, the bill would streamline the regulatory process. The new CRC would be composed of five (instead of the present seven) commissioners, each serving a single ten-year term (though the first five commissioners would serve two, four, six, eight, and ten years, respectively). There would be time limits for licensing and rulemaking, and within ten years the CRC would be required to review its structure and justify a request for new budget authority.

Deregulating cable TV. The bill would withdraw the commission's jurisdiction over cable television. This would extend last year's court of appeals' ruling that struck down certain restrictions on pay-cable (see *Regulation,* July/August 1977) and would reject the FCC's claim that cable television is ancillary to regular network broadcasting and therefore requires government controls. By implication, it would also reject the stations' claim that unrestricted cable growth will erode their profits and damage the quality (and perhaps the existence) of their programming.

Eliminating radio and TV restrictions (and imposing license fees). The bill would impose a license fee on TV stations (and therefore on networks), the amount depending on the cost of processing the license, on whether the station was UHF or VHF, and on the number of prime-time households in the market. Along with helping finance the CRC, these fees would be used to support public television and to make loans both to minority entrepreneurs and to those seeking to develop services in rural areas. Aiming for wide dispersal of power in the industry, the bill would limit an individual to owning one station per market and five overall, but no more than three in the largest markets (as currently defined by the FCC). (Existing combinations would be protected by a "grandfather" clause.) Also, licenses would be renewed for three (instead of the current five) years, with renewals after the first ten years granted for an indefinite period. New licenses would be awarded by lottery if more than one applicant were willing to pay the administratively established license fee.

To a large degree, these provisions would get the government out of regulating TV program content. The FCC currently influences programming by deciding whether to renew a license and by enforcing the fairness doctrine and equal-time rules. But according to Van Deerlin and Frey, the advent of cable TV offers viewers a variety of programs and exposes them to a range of opinions, so that government no longer needs to ensure diversity. Instead, the bill's sponsors envision First Amendment rights for the networks equivalent to those enjoyed by their counterparts in the print media. This involves abolishing the equal-time provisions (except in the case of local elections), denying the CRC any authority over program content, and replacing the fairness doctrine with an equity principle: stations would have to "treat controversial issues of public importance in an equitable manner," though the CRC could not tell them (as the FCC now does) how to "ascertain" the needs and desires of the viewing audience.

Deregulation of radio would go further. Indefinite licenses would be granted on a permanent basis, and regulation would be held to technical guidelines, license fees, and limits on the number of stations that can be owned.

Promoting competition in telecommunications. For the past decade, the commission has allowed competitors to undermine AT&T's (regulated) monopoly in the provision of telephone equipment and specialized business services. In response, AT&T has attacked the FCC for failing to consider the effects of its actions. AT&T claims that the business and equipment markets (as well as long-distance lines) earn profits that subsidize the rates for local service. As competition increases, entrants will "skim the cream" from the lucrative markets, forcing a rise in local rates. The bill addresses this problem by establishing a Universal Service Compensation Fund. AT&T and its rivals (intercity private-line systems) would pay a tax to be used by local phone companies in order to prevent an increase in their rates.

The proposed communications act would, moreover, require AT&T to divest itself of its manufacturing subsidiary, Western Electric. After three years, AT&T could no longer "provide a noncompetitive telecommunications service and also be engaged in the manufacture of equipment used in furnishing any common carrier services." So long as AT&T—or any firm in the communications industry—retained any monopoly, it could not keep a foothold in the increasingly competitive equipment market.

On the other hand, AT&T would be allowed to enter various unregulated noncommunications markets. The bill would end the controversy over the dividing line between data transmission (a service AT&T can provide) and data processing (a service it cannot provide) by permitting AT&T to provide both.

What emerges from the debate may be more modest than what the bill's sponsors intend. In any event, a statutory revision as far-reaching as this one will take time.