HB

21

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House District 10

House of Representatives

Liars Bill

Sponsor Statement

Deception unfairly slandered

HB 21

House Bill 21 may very be the first step to more positive political campaigns. Presently, a candidate running for office, or a group proposing an initiative can be the subject of negative advertising and sometime even lies. HB 21 will establish an administrative process to counteract false attacks in a timely manner.

Under existing law, a false damaging statement in a political advertisement can only be countered with a response, often times along the same lines. Legally the only recourse is to file a civil suit. Because of the backlog in the courts it may be months after the election before the complaint is even heard.

With the passage of HB 21, a candidate or group victimized by false advertising will be able file a complaint with the Alaska Public Offices Commission (APOC). By filling out a form, and providing proof that the statement is false APOC must respond in an expedited manner. The panel will be able to hold hearings and may fine the offending campaign or individual.

HB 21 will cause a candidate or group to consider more closely what they say in their advertising campaigns. Alaskans want the truth about the candidates and issues before they go to the polls just like they do when they purchase a commercial product or service. HB 21 will show our constituents that we, as elected officials, agree.

Representative_Jay_Ramras @legis.state.ak.us

HOUSE BILL NO. 21

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES RAMRAS, Wilson

Introduced: 1/10/05
Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to false statements in state election advertising; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 15.13 is amended by adding a new section to read:

Sec. 15.13.092. False statements in election advertising. (a) A person may not make a false statement in election advertising with knowledge that the statement is false or with a reckless disregard for whether or not the statement is false.

(b) In an administrative complaint under AS 15.13.380 alleging a violation of (a) of this section, the complainant shall

(1) identify with specificity the name of the respondent who made the false statement in election advertising;

(2) attach relevant evidence to support the allegation that the statement is false; and

(3) verify under oath or affirmation before a person authorized by law

to take the person's oath or affirmation that the complainant has read the complaint and believes its contents to be true.

(c) If the person who disseminates the false statement is not the maker of the false statement, the person who disseminates the statement violates (a) of this section only if the person had actual knowledge that the statement was false before disseminating the statement.

(d) A print or broadcast medium by means of which the election advertising is made is not liable for damages caused by the distribution of false information unless the owners of the print or broadcast medium knew or had reason to know the information distributed was false.

(e) In this section, "election advertising" means an announcement or advertisement that is disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing, the principal purpose of which is to influence the outcome of

(1) the election of a candidate; or

(2) an election concerning a ballot proposition; in this paragraph, "proposition" has the meaning given in AS 15.13.065(c).

*** Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

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House of Representatives

MEMO

To: Representative

Fm: Jim Pound, Chief of Staff

Cc:

Date: January 10, 2005, 11:54 AM

Re: Request for hearing of HB 21

Please accept this Memo as a request for the House Committee to hear HB 21 "An Act relating to false statements in state election advertising; and providing for an effective date." HB 21 will allow a political candidate or group that is the subject of false advertising to seek a remedy in an expedited manner through the administrative process.

Thank you in advance for scheduling HB 21 before the House Committee.

Attachments: Sponsor Statement, HB 21, AS 15.13.065(c), AS 15.13.380, FTC Policy Statement on Deception

Thank you

LEGAL SERVICES

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MEMORANDUM January 27, 2005

SUBJECT: Constitutionality of HB 21 (Work Order No. 24-LS0153\A)

TO: Representative Paul Seaton
Attn: Louie Flora

FROM: Barbara R. Craver BRC
Legislative Counsel

You have asked about any constitutional issues raised by HB 21 which concerns false statements in political campaign communications. In my opinion, this bill raises constitutional issues in regard to the curtailment of free speech, particularly in regard to false statements in political advertising regarding initiatives. While there is no Alaska law on this topic or controlling federal law, there is a case from Washington state that raises red flags, particularly relating to prohibiting false statements in regard to ballot measures.

In the Washington case the highest court in that state found that the first amendment of the United States Constitution protected a malicious false statement of material fact made in political advertising. *State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash., 1998). The court found that RCW 42.17.530(1)(a)[1] was unconstitutional on its face. The State alleged that the "119 Vote No!" committee

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[1] RCW 42.17.530 provides:

> False political advertising (1) It is a violation of this chapter for a person to sponsor with actual malice:
> (a) Political advertising that contains a false statement of material fact;
> (b) Political advertising that falsely represents that a candidate is the incumbent for the office sought when in fact the candidate is not the incumbent;
> (c) Political advertising that makes either directly or indirectly, a false claim stating or implying the support or endorsement of any person or organization when in fact the candidate does not have such support or endorsement.
> (2) Any violation of this section shall be proven by clear and convincing evidence.

published political advertising that violated the Washington law. Basically, the court found that the first amendment provided its broadest protection to speech in political campaigns.[2] This case involved allegedly false statements in regard to an initiative, and the court found that free speech was particularly chilled in this case involving an initiative:

> Ultimately, the State's claimed compelling interest to shield the public from falsehoods during a political campaign is patronizing and paternalistic. It assumes the people of this state are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate, and it is the proper role of the government

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[2] The court opinion said:

> The constitutional guarantee of free speech has its "fullest and most urgent application" in political campaigns. *Brown v. Hartlage, 456 U.S. 45, 53, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982)* (quoting *Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971)).* Therefore, the State bears a "well-nigh insurmountable" burden to justify *RCW 42.17.530*'s restriction on political speech. *Meyer v. Grant, 486 U.S. 414, 425, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).* This burden requires the court to apply "exacting scrutiny" to *RCW 42.17.530(1)(a). Meyer, 486 U.S. at 420.* See also *Buckley v. Valeo, 424 U.S. 1, 39, 96, S. Ct. 612, 46 L. Ed. 2d 659 (1976).* Exacting scrutiny will invalidate the statute unless the State demonstrates a compelling interest that is both narrowly tailored and necessary. *McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347, 115 S. Ct. 1511, 1519, 131 L. Ed. 2d 426 (1995); Burson v. Freeman, 504 U.S. 191, 198, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992).* Such burdens are rarely met. *Burson, 504 U.S. at 199-200. Ino Ino, Inc. v. City of Bellevue, 132 Wash. 2d 103, 114, 937 P.2d 154 (1997)* ("The State bears the burden of justifying a restriction on speech."). . . . *RCW 42.17.530(1)(a)* infringes on speech protected by the First Amendment Uninhibited speech "'is the single most important element upon which this nation has thrived.'" *Nelson v. McClatchy Newspapers, Inc., 131 Wash. 2d 523, 536, 936 P.2d 1123* (quoting *Guzick v. Drebus, 305 F. Supp. 472, 481 (N.D. Ohio 1969),* aff'd, *431 F.2d 594 (6th Cir. 1970),* cert. denied, *401 U.S. 948, 91 S. Ct. 941, 28 L. Ed. 2d 231 (1971)),* cert. denied, *118 S. Ct. 175, 139 L. Ed. 2d 117 (1997).* Free speech is revered as the "Constitution's majestic guarantee," central to the preservation of all other rights. *Id. at 536.* Advocacy of one's political views through leafleting lies at the very core of our First Amendment freedoms. *McIntyre, 514 U.S. at 346-47; Meyer, 486 U.S. at 421-22.*

State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 694 - 695.

> itself to fill the void. This assumption is especially flawed in cases like this where the truth of the assertion may be readily tested against the text of the initiative.

State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 699 (citations omitted). Three judges concurred with the court's decision but on different grounds. Two of those judges (Justices Guy and Talmadge) declared that the committee that had made the political advertisement did not violate the law, but also found that the law did not violate the first amendment. *Id.*, 633; 636 - 658. One of the three (Justice Madsen) wrote a concurrence to say that the first amendment definitely protected false statements in regard to initiatives, but that same protection might not extend to deliberate falsehoods about candidates. *Id.* at 633.

This case is not controlling in Alaska, and numerous commentators have taken exception to this case, but it still stands, and illustrates that some caution is warranted.

By contrast, an Ohio law prohibiting false statements in political advertising was upheld by the Sixth Circuit of the U.S. Court of Appeals. The Ohio law allowed the Ohio Elections Commission to make findings regarding allegedly false statements and to refer a violation for prosecution. *Pestrak v. Ohio Elections Com.*, 926 F.2d 573, 1991 U.S. App. LEXIS 3151 (6th Cir. 1991). This case was denied certiorari by the U. S. Supreme Court in 1991, and has not been overruled in the Sixth Circuit. This case was cited by Justice Talmadge in his comprehensive "concurring"[3] opinion in the Washington case.[4]

If I may be of further assistance, please advise.

BRC:med
05-057.med

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[3] Justice Talmadge concurred with the dismissal of the case against the committee, but disagreed completely on the legal grounds for doing so, arguing that the Washington law was not unconstitutional on its face.

[4] State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 649, n 3.

Sec. 15.13.065. Contributions.

(c) Except for reports required by AS 15.13.040 and 15.13.110 and except for the requirements of AS 15.13.050, 15.13.060, and 15.13.112 - 15.13.114, the provisions of AS 15.13.010 - 15.13.116 do not apply to limit the authority of a person to make contributions to influence the outcome of a ballot proposition. In this subsection, in addition to its meaning in AS 15.60.010, "proposition" includes an issue placed on a ballot to determine whether
(1) a constitutional convention shall be called;
(2) a debt shall be contracted;
(3) an advisory question shall be approved or rejected; or
(4) a municipality shall be incorporated.
History
(§ 9 ch 48 SLA 1996; am § 7 ch 1 SLA 2002)
Annotations
Administrative Code. - For campaign disclosure, see 2 AAC 50, art. 2.

Sec. 15.60.010. Definitions.
Statute text
In this title, unless the context otherwise requires,

(25) "proposition" means an initiative, referendum, or constitutional amendment submitted at an election to the public for vote;

Sec. 15.13.380. Violations; limitations on actions.

Statute text

(a) Promptly after the final date for filing statements and reports under this chapter, the commission shall notify all persons who have become delinquent in filing them, including contributors who failed to file a statement in accordance with AS 15.13.040, and shall make available a list of those delinquent filers for public inspection. The commission shall also report to the attorney general the names of all candidates in an election whose campaign treasurers have failed to file the reports required by this chapter.

(b) A member of the commission, the commission's executive director, or a person who believes a violation of this chapter or a regulation adopted under this chapter has occurred or is occurring may file an administrative complaint with the commission within one year after the date of the alleged violation. If a member of the commission has filed the complaint, that member may not participate as a commissioner in any proceeding of the commission with respect to the complaint. The commission may consider a complaint on an expedited basis or a regular basis.

(c) The complainant or the respondent to the complaint may request in writing that the commission expedite consideration of the complaint. A request for expedited consideration must be accompanied by evidence to support expedited consideration and be served on the opposing party. The commission shall grant or deny the request within two days after receiving it. In deciding whether to expedite consideration, the commission shall consider such factors as whether the alleged violation, if not immediately restrained, could materially affect the outcome of an election or other impending event; whether the alleged violation could cause irreparable harm that penalties could not adequately remedy; and whether there is reasonable cause to believe that a violation has occurred or will occur. Notwithstanding the absence of a request to expedite consideration, the commission may independently expedite consideration of the complaint if the commission finds that the standards for expedited consideration set out in this subsection have been met.

(d) If the commission expedites consideration, the commission shall hold a hearing on the complaint within two days after granting expedited consideration. Not later than one day after affording the respondent notice and an opportunity to be heard, the commission shall

(1) enter an emergency order requiring the violation to be ceased or to be remedied and assess civil penalties under AS 15.13.390 if the commission finds that the respondent has engaged in or is about to engage in an act or practice that constitutes or will constitute a violation of this chapter or a regulation adopted under this chapter;

(2) enter an emergency order dismissing the complaint if the commission finds that the respondent has not or is not about to engage in an act or practice that constitutes or will constitute a violation of this chapter or a regulation adopted under this chapter; or

(3) remand the complaint to the executive director of the commission for consideration by the commission on a regular rather than an expedited basis.

(e) If the commission accepts the complaint for consideration on a regular rather than an expedited basis, the commission shall notify the respondent within seven days after receiving the complaint and shall investigate the complaint. The respondent may answer the complaint by filing a written response with the commission within 15 days after the commission notifies the respondent of the complaint. The commission may grant the respondent additional time to respond to the complaint only for good cause. The commission shall hold a hearing on the complaint not later than 45 days after the respondent's written response is due. Not later than 10 days after the hearing, the commission shall issue its order. If the commission finds that the

respondent has engaged in or is about to engage in an act or practice that constitutes or will constitute a violation of this chapter or a regulation adopted under this chapter, the commission shall enter an order requiring the violation to be ceased or to be remedied and shall assess civil penalties under AS 15.13.390.

(f) If the complaint involves a challenge to the constitutionality of a statute or regulation, necessary witnesses that are not subject to the commission's subpoena authority, or other issues outside the commission's authority, the commission may request the attorney general to file a complaint in superior court alleging a violation of this chapter. The commission may request the attorney general to file a complaint in superior court to remedy the violation of a commission order.

(g) A commission order under (d) or (e) of this section may be appealed to the superior court by either the complainant or respondent within 30 days in accordance with the Alaska Rules of Appellate Procedure.

(h) If the commission does not complete action on an administrative complaint within 90 days after the complaint was filed, the complainant may file a complaint in superior court alleging a violation of this chapter by a respondent as described in the administrative complaint filed with the commission. The complainant shall provide copies of the complaint filed in the superior court to the commission and the attorney general. This subsection does not create a private cause of action against the commission; against the commission's members, officers, or employees; or against the state.

(i) If a person who was a successful candidate or the campaign treasurer or deputy campaign treasurer of a person who was a successful candidate is convicted of a violation of this chapter, after the candidate is sworn into office, proceedings shall be held and appropriate action taken in accordance with

(1) art. II, sec. 12, of the state constitution, if the successful candidate is a member of the state legislature;

(2) art. II, sec. 20, of the state constitution, if the successful candidate is governor or lieutenant governor;

(3) the provisions of the call for the constitutional convention, if the successful candidate is a constitutional convention delegate;

(4) art. IV, sec. 10, of the state constitution, if the successful candidate is a judge.

(j) Information developed by the commission under (b) - (e) of this section shall be considered during a proceeding under (i) of this section.

(k) If, after a successful candidate is sworn into office, the successful candidate or the campaign treasurer or deputy campaign treasurer of the person who was a successful candidate is charged with a violation of this chapter, the case shall be promptly tried and accorded a preferred position for purposes of argument and decision so as to ensure a speedy disposition of the matter.

History

(§ 1 ch 76 SLA 1974; am § 25 ch 189 SLA 1975; am §§ 1, 6 ch 134 SLA 1982; am §§ 33 - 36 ch 74 SLA 1985; am § 26 ch 14 SLA 1987; am §§ 20, 21, 28 ch 48 SLA 1996; am § 6 ch 1 SLA 2002 TSSLA; am § 17 ch 108 SLA 2003)

Annotations

Revisor's notes. Formerly AS 15.13.120. Renumbered in 2000, at which time, "AS 15.13.390" was substituted for "AS 15.13.125" in subsection (d) in order to reflect the 2000 renumbering of AS 15.13.125.

Effect of amendments. The 1996 amendment, effective January 1, 1997, repealed subsection (a), and rewrote subsections (d) and (e).

The 2002 amendment, effective June 26, 2002, deleted ", including contributors who failed to file a statement in accordance with AS 15.13.040," following "delinquent in filing them" in the first sentence in subsection (c).

The 2003 amendment, effective September 14, 2003, rewrote this section.

NOTES TO DECISIONS

ANALYSIS

I. General Consideration
II. Forfeiture Sanction

I. GENERAL CONSIDERATION.

This section contains no scienter requirement and the court would not impose one. *State, Alaska Pub. Offices Comm'n v. Marshall*, 633 P.2d 227 (Alaska 1981).

Quoted in *Messerli v. State*, 626 P.2d 81 (Alaska 1980).

II. FORFEITURE SANCTION.

Annotator's notes. - Subsection (b), which contained a forfeiture sanction for violation of AS 15.13, was repealed in 1982.

Constitutionality of forfeiture sanction. - The forfeiture sanction of subsection (b) (now repealed) does not conflict with any constitutional provision delimiting the qualifications of assembly or council members or with any provision reserving exclusive authority to determine a member's election to those local entities. *State, Alaska Pub. Offices Comm'n v. Marshall*, 633 P.2d 227 (Alaska 1981).

Even if the forfeiture sanction of subsection (b) (now repealed) may conflict with Alaska Const., art. II, § 12, insofar as state legislative elections are concerned, it can nonetheless constitutionally apply to local elections. *State, Alaska Pub. Offices Comm'n v. Marshall*, 633 P.2d 227 (Alaska 1981).

The forfeiture sanction is valid. *State, Alaska Pub. Offices Comm'n v. Marshall*, 633 P.2d 227 (Alaska 1981).

The deadlines for filing are mandatory, and the plain meaning of this section makes the forfeiture sanction applicable. *State, Alaska Pub. Offices Comm'n v. Marshall*, 633 P.2d 227 (Alaska 1981).

The statutory forfeiture of office provision applied to the election of a city councilman and borough assemblyman whose 1980 seven-day pre-election report was not filed until well after the election. *State, Alaska Pub. Offices Comm'n v. Marshall*, 633 P.2d 227 (Alaska 1981).

The absence of regulations is not fatal to enforcement of the forfeiture sanction because they are not necessary to implement the sanction or to protect a constitutional right. *State, Alaska Pub. Offices Comm'n v. Marshall*, 633 P.2d 227 (Alaska 1981).

Sec. 15.13.385. Legal counsel.

Statute text

(a) The attorney general is legal counsel for the commission. The attorney general shall advise the commission in legal matters arising in the discharge of its duties and represent the commission in actions to which it is a party. If, in the opinion of the commission, the public interest warrants, the commission may request the chief justice of the supreme court to appoint a special prosecutor to represent the commission in a proceeding involving an alleged violation of this chapter and to prosecute that violation.

(b) When the public interest warrants, the commission may employ temporary legal counsel from time to time in matters in which the commission is involved.

History

(§ 26 ch 189 SLA 1975)

Annotations

Revisor's notes. Formerly AS 15.13.122. Renumbered in 2000.

FTC POLICY STATEMENT ON DECEPTION

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 14, 1983

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to the Committee's inquiry regarding the Commission's enforcement policy against deceptive acts or practices.[1] We also hope this letter will provide guidance to the public.

Section 5 of the FTC Act declares unfair or deceptive acts or practices unlawful. Section 12 specifically prohibits false ads likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 defines a false ad for purposes of Section 12 as one which is "misleading in a material respect."[2] Numerous Commission and judicial decisions have defined and elaborated on the phrase "deceptive acts or practices" under both Sections 5 and 12. Nowhere, however, is there a single definitive statement of the Commission's view of its authority. The Commission believes that such a statement would be useful to the public, as well as the Committee in its continuing review of our jurisdiction.

We have therefore reviewed the decided cases to synthesize the most important principles of general applicability. We have attempted to provide a concrete indication of the manner in which the Commission will enforce its deception mandate. In so doing, we intend to address the concerns that have been raised about the meaning of deception, and thereby attempt to provide a greater sense of certainty as to how the concept will be applied.[3]

I. SUMMARY

Certain elements undergird all deception cases. First, there must be a representation, omission or practice that is likely to mislead the consumer.[4] Practices that have been found misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.[5]

Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.

Third, the representation, omission, or practice must be a "material" one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary.

Thus, the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. We discuss each of these elements below.

II. THERE MUST BE A REPRESENTATION, OMISSION, OR PRACTICE THAT IS LIKELY TO MISLEAD THE CONSUMER.

Most deception involves written or oral misrepresentations, or omissions of material information. Deception may also occur in other forms of conduct associated with a sales transaction. The entire advertisement, transaction or course of dealing will be considered. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deceptions.

Of course, the Commission must find that a representation, omission, or practice occurred in cases of express claims, the representation itself establishes the meaning. In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document the nature of the claim, and the nature of the transactions.[7] In other situations, the Commission will require extrinsic evidence that reasonable consumers reach the implied claims.[8] In all instances, the Commission will carefully consider any extrinsic evidence that is introduced.

Some cases involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.[9] Information may be omitted from written[10] or oral[11] representations or from the commercial transaction.12

In some circumstances, the Commission can presume that consumers are likely to reach false beliefs about the product or service because of an omission. At other times, however, the Commission may require evidence on consumers' expectations.[13]

Marketing and point-of-sales practices that are likely to mislead consumers are also deceptive. For instance, in bait and switch cases, a violation occurs when the offer to sell the product is not a bona fide offer.[14] The Commission has also found deception where a sales representative misrepresented the purpose of the initial contact with customers.[15] When a product is sold, there is an implied representation that the product is fit for the purposes for which it is sold. When it is not, deception occurs.[16] There may be a concern about the way a product or service is marketed, such as where inaccurate or incomplete information is provided.[17] A failure to perform services promised under a warranty or by contract can also be deceptive.[18]

III. THE ACT OR PRACTICE MUST BE CONSIDERED FROM THE PERSPECTIVE OF THE REASONABLE CONSUMER

The Commission believes that to be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances.[19] The test is whether the consumer's interpretation or reaction is reasonable.[20] When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.

A company is not liable for every interpretation or action by a consumer. In an advertising context, this principle has been well-stated:

> An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it therefore an actionable deception to advertise "Danish pastry" when it is made in this country.? Of course not, A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed. Heinz W. Kirchner, 63 F.T.C. 1282, 1290 (1963).

To be considered reasonable, the interpretation or reaction does not have to be the only one.[21] When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.[22] An interpretation will be presumed reasonable if it is the one the respondent intended to convey.

The Commission has used this standard in its past decisions. The test applied by the Commission is whether the interpretation is reasonable in light of the claim."[23] In the Listerine case, the Commission evaluated the claim from the perspective of the "average listener."[24] In a case involving the sale of encyclopedias, the Commission observed "[i]n determining the meaning of an advertisement, a piece of promotional material or a sales presentation, the important criterion is the net impression that it is likely to make on the general populace."[25] The decisions in American Home Products, Bristol Myers, and Sterling Drug are replete with references to reasonable consumer interpretations.[26] In a land sales case, the Commission evaluated the oral statements and written representations "in light of the sophistication and understanding of the persons to whom they were directed."[27] Omission cases are no different: the Commission examines the failure to disclose in light of expectations and understandings of the typical buyer[28] regarding the claims made.

When representations or sales practices are targeted to a specific audience, such as

children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group.[29] For instance, if a company markets a cure to the terminally ill, the practice will be evaluated from the perspective of how it affects the ordinary member of that group. Thus, terminally ill consumers might be particularly susceptible to exaggerated cure claims. By the same token, a practice or representation directed to a well-educated group, such as a prescription drug advertisement to doctors, would be judged in light of the knowledge and sophistication of that group.[30]

As it has in the past, the Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, in advertising the Commission will examine "the entire mosaic, rather than each tile separately."[31] As explained by a court of appeals in a recent case:

> The Commission's right to scrutinize the visual and aural imagery of advertisements follows from the principle that the Commission looks to the impression made by the advertisements as a whole. Without this mode of examination, the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words. American Home Products, 695 F.2d 681, 688 (3d Cir. Dec. 3, 1982).[32]

In a case involving a weight loss product, the Commission observed:

> It is obvious that dieting is the conventional method of losing weight. But it is equally obvious that many people who need or want to lose weight regard dieting as bitter medicine. To these corpulent consumers the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance, if not abstinence, simply does not pass muster. Porter & Dietsch, 90 F.T.C. 770, 864-865 (1977), 605 F.2d 294 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980).

Children have also been the specific target of ads or practices. In *Ideal Toy*, the Commission adopted the Hearing Examiner's conclusion that:

> False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue. *Ideal Toy*, 64 F.T.C. 297, 310 (1964).

See also, *Avalon Industries Inc.*, 83 F.T.C. 1728, 1750 (1974).

In a subsequent case, the Commission explained that "[i]n evaluating advertising representations, we are required to look at the complete advertisement and formulate our opinions on them on the basis of the net general impression conveyed by them and not on isolated excerpts." *Standard Oil of Calif*, 84 F.T.C. 1401, 1471 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978), *reissued*, 96 F.T.C. 380 (1980).

The Third Circuit stated succinctly the Commission's standard. "The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context." *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert denied*, 430 U.S. 983 (1977).

Commission cases reveal specific guidelines. Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline.[33] Written disclosures or fine print may be insufficient to correct a misleading representations.[34] Other practices of the company may direct consumers' attention away from the qualifying disclosures.[35] Oral statements, label disclosures or point-of-sale material will not necessarily correct a deceptive representation or omission.[36] Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.[37] Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices.[38]

Qualifying disclosures must be legible and understandable. In evaluating such disclosures, the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller. Disclosures that conform to the Commission's Statement of Enforcement Policy regarding clear and conspicuous disclosures, which applies to television advertising, are generally adequate, CCH Trade Regulation Reporter, ¶ 7569.09 (Oct. 21, 1970). Less elaborate disclosures may also suffice.[39]

Certain practices, however, are unlikely to deceive consumers acting reasonably. Thus, the Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion.[40] Claims phrased as opinions are actionable, however, if they are not honestly held, if they misrepresent the qualifications of the holder or the basis of his opinion or if the recipient reasonably interprets them as implied statements of fact.[41]

The Commission generally will not pursue cases involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously.42 Some exaggerated claims, however, may be taken seriously by consumers and are actionable. For instance, in rejecting a respondent's argument that use of the words "electronic miracle" to describe a television antenna was puffery, the Commission stated:

Although not insensitive to respondent's concern that the term miracle is commonly used in situations short of changing water into wine, we must conclude that the use of "electronic miracle" in the context of respondent's grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae. *Jay Norris*, 91 F.T.C. 751, 847 n.20 (1978), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

Finally, as a matter of policy, when consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased, the Commission will examine the

practice closely before issuing a compl. int based on deception. There is little incentive for sellers to misrepresent (either by an explicit false statement or a deliberate false implied statement) in these circumstances since they normally would seek to encourage repeat purchases. Where, as here, market incentives place strong constraints on the likelihood of deception, the Commission will examine a practice closely before proceeding.

In sum, the Commission will consider many factors in determining the reaction of the ordinary consumer to a claim or practice. As would any trier of fact, the Commission will evaluate the totality of the ad or the practice and ask questions such as: how clear is the representation? how conspicuous is any qualifying information? how important is the omitted information? do other sources for the omitted information exist? how familiar is the public with the product or service?[43]

IV. THE REPRESENTATION, OMISSION OR PRACTICE MUST BE MATERIAL

The third element of deception is materiality. That is, a representation, omission or practice must be a material one for deception to occur.[44] A "material" misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product.[45] In other words, it is information that is important to consumers. If inaccurate or omitted information is material, injury is likely.[46]

The Commission considers certain categories of information presumptively material.[47] First, the Commission presumes that express claims are material.[48] As the Supreme Court stated recently, "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."[49] Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect.[50] Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.[51]

The Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned. Depending on the facts, information pertaining to the central characteristics of the product or service will be presumed material. Information has been found material where it concerns the purpose,[52] safety,[53] efficacy,[54] or cost,[55] of the product or service. Information is also likely to be material if it concerns durability, performance, warranties or quality. Information pertaining to a finding by another agency regarding the product may also be material.[56]

Where the Commission cannot find materiality based on the above analysis, the Commission may require evidence that the claim or omission is likely to be considered important by consumers. This evidence can be the fact that the product or service with the feature represented costs more than an otherwise comparable product without the feature, a reliable survey of consumers, or credible testimony.[57]

A finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique. Injury to consumers can take many forms.[58] Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept.

V. CONCLUSION

The Commission will find an act or practice deceptive if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment. The Commission will not generally require extrinsic evidence concerning the representations understood by reasonable consumers or the materiality of a challenged claim, but in some instances extrinsic evidence will be necessary.

The Commission intends to enforce the FTC Act vigorously. We will investigate, and prosecute where appropriate, acts or practices that are deceptive. We hope this letter will help provide you and the public with a greater sense of certainty concerning how the Commission will exercise its jurisdiction over deception. Please do not hesitate to call if we can be of any further assistance.

By direction of the Commission, Commissioners Pertschuk and Bailey dissenting, with separate statements attached and with separate response to the Committee's request for a legal analysis to follow.

/s/James C. Miller III
Chairman

cc: Honorable James T. Broyhill
Honorable James J. Florio
Honorable Norman F. Lent

Endnotes:

[1]S. Rep. No. 97-451, 97th Cong., 2d Sess. 16; H.R. Rep. No. 98-156, Part I, 98th Cong., 1st Sess. 6 (1983). The Commission's enforcement policy against unfair acts or practices is set forth in a letter to Senators Ford and Danforth, dated December 17, 1980.

[2]In determining whether an ad is misleading, Section 15 requires that the Commission take into account "representations made or suggested" as well as "the extent to which the advertisement fails to reveal facts material in light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." 15 U.S.C. 55. If an act or practice violates Section 12, it also violates Section 5. *Simeon Management Corp.*, 87 F.T.C. 1184, 1219 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978); *Porter & Dietsch*, 90 F.T.C. 770, 873-74 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

[3]Chairman Miller has proposed that Section 5 be amended to define deceptive acts. Hearing Before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation, United States Senate, 97th Cong., 2d Sess. *FTC's Authority Over Deceptive Advertising*, July 22,1982, Serial No. 97-134, p. 9. Three Commissioners believe a legislative definition is unnecessary. *Id.* at 45 (Commissioner

Clanton), at 51 (Commissioner Bailey) and at 76 (Commissioner Pertschuk). Commissioner Douglas supports a statutory definition of deception. Prepared statement by Commissioner George W. Douglas, Hearing Before the Subcommittee for Consumers of the Committee on Commerce, Science and Transportation, United States Senate, 98th Cong. 1st Sess. (March 16, 1983) p. 2.

[4]A misrepresentation is an express or implied statement contrary to fact. A misleading omission occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed. Not all omissions are deceptive, even if providing the information would benefit consumers. As the Commission noted in rejecting a proposed requirement for nutrition disclosures, "In the final analysis, the question whether an advertisement requires affirmative disclosure would depend on the nature and extent of the nutritional claim made in the advertisement.". ITT Continental Baking Co. Inc., 83 F.T.C. 865, 965 (1976). In determining whether an omission is deceptive, the Commission will examine the overall impression created by a practice, claim, or representation. For example, the practice of offering a product for sale creates an implied representation that it is fit for the purposes for which it is sold. Failure to disclose that the product is not fit constitutes a deceptive omission. [See discussion below at 5-6) Omissions may also be deceptive where the representations made are not literally misleading, if those representations create a reasonable expectation or belief among consumers which is misleading, absent the omitted disclosure.

Non-deceptive emissions may still violate Section 5 if they are unfair. For instance, the R-Value Rule, 16 C.F.R. 460.5 (1983), establishes a specific method for testing insulation ability, and requires disclosure of the figure in advertising. The Statement of Basis and Purpose, 44 FR 50,242 (1979), refers to a deception theory to support disclosure requirements when certain misleading claims are made, but the rule's general disclosure requirement is based on an unfairness theory. Consumers could not reasonably avoid injury in selecting insulation because no standard method of measurement existed.

[5]Advertising that lacks a reasonable basis is also deceptive. *Firestone*, 81 F.T.C. 398, 451-52 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). *National Dynamics*, 82 F.T.C. 488, 549-50 (1973); *aff'd and remanded on other grounds*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), *reissued*, 85 F.T.C. 391 (1976). *National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 191 (1976), *aff'd*, 570 P.2d 157 (7th Cir.), *cert. denied*, 439 U.S. 821, *reissued*, 92 F.T.C. 848 (1978). The deception theory is based on the fact that most ads making objective claims imply, and many expressly state, that an advertiser has certain specific grounds for the claims. If the advertiser does not, the consumer is acting under a false impression. The consumer might have perceived the advertising differently had he or she known the advertiser had no basis for the claim. This letter does not address the nuances of the reasonable basis doctrine, which the Commission is currently reviewing. 48 FR 10,471 (March 11, 1983)

[6]In *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), the court noted "the likelihood or propensity of deception is the criterion by which advertising is measured."

[7]On evaluation of the entire document:

> The Commission finds that many of the challenged Anacin advertisements, when viewed in their entirety, did convey the message that the superiority of this product has been proven [footnote omitted]. It is immaterial that the word "established", which was used in the complaint, generally did not appear in the ads; the important consideration is the net impression conveyed to the public. *American Home Products*, 98 F.T.C. 136, 374 (1981), *aff'd*. 695 F.2d (3d Cir. 1982).

On the juxtaposition of phrases:

> On this label, the statement "Kills Germs By Millions On Contact" immediately precedes the assertion "For General Oral Hygiene Bad Breath, Colds and Resultant Sore Throats" [footnote omitted]. By placing these two statements in close proximity, respondent has conveyed the message that since Listerine can kill millions of germs, it can cure, prevent and ameliorate colds and sore throats [footnote omitted]. *Warner Lambert*, 86F.T.C. 1398, 1489-90 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950

(1978) (emphasis in original).

On the nature of the claim, *Firestone* is relevant. There the Commission noted that the alleged misrepresentation concerned the safety of respondent's product, "an issue of great significance to consumers. On this issue, the Commission has required scrupulous accuracy in advertising claims, for obvious reasons." 81 F.T.C. 398,456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

In each of these cases, other factors, including in some instances surveys, were in evidence on the meaning of the ad.

[8]The evidence can consist of expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation.

[9]As the Commission noted in the Cigarette rule, "The nature, appearance, or intended use of a product may create the impression on the mind of the consumer ... and if the impression is false, and if the seller does not take adequate steps to correct it, he is responsible for an unlawful deception." Cigarette Rule Statement of Basis and Purpose, 29 FR 8324, 8352 (July 2, 1964).

[10]*Porter & Dietsch*, 90 F.T.C. 770, 873-74 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Simeon Management Corp.*, 87 F.T.C. 1184, 1230 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978).

[11]*See, e.g., Grolier*, 91 F.T.C. 315,480 (1978), *remanded on other grounds*, 615 F.2d 1215 (9th Cir. 1980), *modified on other grounds*, 98 FM 882 (1981), *reissued*, 99 F.T.C. 379 (1982).

[12]In *Peacock Buick*, 86 F.T.C. 1532 (1975), *aff'd*, 553 F.2d 97 (4th Cir. 1977), the Commission held that absent a clear and early disclosure of the prior use of a late model car, deception can result from the setting in which a sale is made and the expectations of the buyer ... *Id* at 1555.

Even in the absence of affirmative misrepresentations, it is misleading for the seller of late model used cars to fail to reveal the particularized uses to which they have been put... When a later model used car is sold at close to list price ... the assumption likely to be made by some purchasers is that, absent disclosure to the contrary, such car has not previously been used in a way that might substantially impair its value. In such circumstances, failure to disclose a disfavored prior use may tend to mislead. *Id* at 1557-58.

[13]In *Leonard Porter*, the Commission dismissed a complaint alleging that respondents' sale of unmarked products in Alaska led consumers to believe erroneously that they were handmade in Alaska by natives. Complaint counsel had failed to show that consumers of Alaskan craft assumed respondents' products were handmade by Alaskans in Alaska. The Commission was unwilling, absent evidence, to infer from a viewing of the items that the products would tend to mislead consumers.

By requiring such evidence, we do not imply that elaborate proof of consumer beliefs or behavior is necessary, even in a case such as this, to establish the requisite capacity to deceive. However, where visual inspection is inadequate, some extrinsic testimony evidence must be added. 88 F.T.C. 546, 626, n.5 (1976).

[14]*Bait and Switch Policy Protocol*, December 10, 1975; Guides Against Bait Advertising, 16 C.F.R. 238.0 (1967). 32 PR 15,540.

[15]*Encyclopedia Britannica* 87 F.T.C. 421, 497 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), *modified*, 100 F.T.C. 500 (1982).

[16]See the complaints in *BayleySuit*, C-3117 (consent agreement) (September 30,1983) [102 F.T.C. 1285];

Figgie International, Inc., D. 9166 (May 17, 1983).

[17]The Commission s complaints in *Chrysler Corporation*, 99 F.T.C. 347 (1982), and *Volkswagen of America*, 99 F.T.C. 446 (1982), alleged the failure to disclose accurate use and care instructions for replacing oil filters was deceptive. The complaint in *Ford Motor Co.*, D. 9154, 96 F.T.C. 362 (1980), charged Ford with failing to disclose a "piston scuffing" defect to purchasers and owners which was allegedly widespread and costly to repair. *See also General Motors*, D. 9145 (provisionally accepted consent agreement, April 26, 1983). [102 F.T.C. 1741]

[18]*See Jay Norris Corp.*, 91 F.T.C. 751 (1978), *aff'd with modified language in order*, 598 P.2d 1244 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979) (failure to consistently meet guarantee claims of"immediate and prompt" delivery as well as money back guarantees); *Southern States Distributing Co.*, 83 F.T.C. 1126 (1973) (failure to honor oral and written product maintenance guarantees, as represented); *Skylark Originals, Inc.*, 80 F.T.C. 337 (1972), *aff'd*, 475 F.2d 1396 (3d Cir. 1973) (failure to promptly honor moneyback guarantee as represented in advertisements and catalogs); *Capitol Manufacturing Corp.*, 73 F.T.C. 874 (1968) (failure to fully, satisfactorily and promptly meet all obligations and requirements under terms of service guarantee certificate).

[19]The evidence necessary to determine how reasonable consumers understand a representation is discussed in Section II of this letter.

[20]An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive. *See Heinz W. Kirchner*, 63 F.T.C. 1282 (1963).

[21]A secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate. *Sears, Roebuck & Co.*, 95 F.T.C. 406, 511 (1980), *aff'd* 676 F.2d 385, (9th Cir. 1982); *Chrysler*, 87 F.T.C. 749 (1976), *aff'd*, 561 F.2d 357 (D.C. Cir.), *reissued* 90 F.T.C. 606 (1977); *Rhodes Pharmacal Co.*, 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955).

[22]*National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 185 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977); *Jay Norris Corp.*, 91 F.T.C. 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979).

[23]*National Dynamics*, 82 F.T.C. 488, 524, 548 (1973), *aff'd*, 492 P.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), *reissued* 85 F.T.C. 391 (1976).

[24]*Warner-Lambert*, 86 F.T.C. 1398, 1415 n.4 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert denied*, 435 U.S. 950 (1978).

[25]*Grolier*, 91 F.T.C. 315, 430 (1978), *remanded on other grounds*, 615 F.2d 1215 (9th Cir. 1980), *modified on other grounds*, 98 F.T.C. 882 (1981), *reissued*, 99 F.T.C. 379 (1982).

[26]*American Home Products*, 98 F.T.C. 136 (1981), *aff'd* 695 F.2d 681 (3d Cir. 1982). consumers may be led to expect, quite reasonably..." (at 386); "... consumers may reasonably believe. ." (*Id.* n.52); "... would reasonably have been understood by consumers...." (at 371); "the record shows that consumers could reasonably have understood this language . . ." (at 372). See also, pp. 373, 374, 375. *Bristol-Myers*, D. 8917 (July 5, 1983), appeal docketed, No. 83-4167 (2nd Cir. Sept. 12,1983)..... ads must be judged by the impression they make on reasonable members of the public . . . " (Slip Op. at 4); ". . . consumers could reasonably have understood . . ." (Slip Op. at 7); ". . . consumers could reasonably infer . . ." (Slip Op. at 11) [102 F.T.C. 21 (1983)]. *Sterling Drug, Inc.*, D. 8919 (July 5,1983), appeal docketed, No. 83-7700 (9th Cir. Sept. 14,1983)..... consumers could reasonably assume . . ." (Slip Op. at 9); ". . . consumers could reasonably interpret the ads . . ." (Slip Op. at 33). [102 F.T.C. 395 (1983)]

[27] *Horizon Corp.*, 97 F.T.C. 464, 810 n.13 (1981).

[28] *Simeon Management*, 87 F.T.C. 1184, 1230 (1976).

[29] The listed categories are merely examples. Whether children, terminally ill patients, or any other subgroup of the population will be considered a special audience depends on the specific factual context of the claim or the practice.

The Supreme Court has affirmed this approach. "The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience." *Bates v. Arizona*, 433 U.S 350, 383 n.37 (1977).

[30] In one case, the Commission's complaint focused on seriously ill persons. The ALJ summarized: According to the complaint, the frustrations and hopes of the seriously ill and their families were exploited, and the representation had the tendency and capacity to induce the seriously ill to forego conventional medical treatment worsening their condition and in some cases hastening death, or to cause them to spend large amounts of money and to undergo the inconvenience of traveling for a non-existent "operation." *Travel King*, 86 F.T.C. 715, 719 (1975).

[31] *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963).

[32] Numerous cases exemplify this point. For instance, in *Pfizer*, the Commission ruled that "the net impression of the advertisement, evaluated from the perspective of the audience to whom the advertisement is directed, is controlling." 81 F.T.C. 23, 58 (1972).

[33] In *Litton Industries*, the Commission held that fine print disclosures that the surveys included only "Litton authorized" agencies were inadequate to remedy the deceptive characterization of the survey population in the headline. 97 F.T.C. 1, 71, n.6 (1981), *aff'd as modified*, 676 F.2d 364 (9th Cir. 1982). Compare the Commission's note in the same case that the fine print disclosure "Litton and one other brand" was reasonable to quote the claim that independent service technicians had been surveyed, "[F]ine print was a reasonable medium for disclosing a qualification of only limited relevance." 97 F.T.C. 1, 70, n.5 (1981).

In another case, the Commission held that the body of the ad corrected the possibly misleading headline because in order to enter the contest, the consumer had to read the text, and the text would eliminate any false impression stemming from the headline. *D.L. Blair*, 82 F.T.C. 234, 255,256 (1973).

In one case respondent's expert witness testified that the headline (and accompanying picture) of an ad would be the focal point of the first glance. He also told the administrative law judge that a consumer would spend [t]ypically a few seconds at most" on the ads at issue. *Crown Central*, 84 F.T.C. 1493, 1543 nn. 14-15 (1974).

[34] In *Giant Food*, the Commission agreed with the examiner that the fine-print disclaimer was inadequate to correct a deceptive impression. The Commission quoted from the examiner's finding that "very few if any of the persons who would read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer." 61 F.T.C. 326, 348 (1962).

Cf. Beneficial Corp. v. FTC, 542 F.2d 611, 618 (3d Cir. 1976), where the court reversed the Commission's opinion that no qualifying language could eliminate the deception stemming from use of the slogan "Instant Tax Refund."

[35] "Respondents argue that the contracts which consumers signed indicated that credit life insurance was not required for financing, and that this disclosure obviated the possibility of deception. We disagree. It Is

clear from consumer testimony that oral deception was employed in some instances to cause consumers to ignore the warning in their sales agreement. . ." *Peacock Buick*, 86 F.T.C. 1532, 1558-59 (1974).

[36] *Exposition Press*, 295 F.2d 869, 873 (2d Cir. 1961); *Gimbel Bros.*, 61 F.T.C. 1051, 1066 (1962); *Carter Products*, 186 F.2d 821, 824 (1951).

By the same token, money-back guarantees do not eliminate deception. In *Sears*, the Commission observed:

> A money-back guarantee is no defense to a charge of deceptive advertising.... A money-back guarantee does not compensate the consumer for the often considerable time and expense incident to returning a major-ticket item and obtaining a replacement.

Sears, Roebuck and Co., 95 F.T.C. 406, 518 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982). However, the existence of a guarantee, if honored, has a bearing on whether the Commission should exercise its discretion to prosecute. *See* Deceptive and Unsubstantiated Claims Policy Protocol, 1975.

[37] *See American Home Products*, 98 F.T.C. 136, 370 (1981), *aff'd*, 695 F.2d 681, 688 (3d Cir. Dec. 3, 1982). Whether a disclosure on the label cures deception in advertising depends on the circumstances:

> ... it is well settled that dishonest advertising is not cured or excused by honest labeling [footnote omitted]. Whether the ill-effects of deceptive nondisclosure can be cured by a disclosure requirement limited to labeling, or whether a further requirement of disclosure in advertising should be imposed, is essentially a question of remedy. As such it is a matter within the sound discretion of the Commission [footnote omitted]. The question of whether in a particular case to require disclosure in advertising cannot be answered by application of any hard-and-fast principle. The test is simple and pragmatic. Is it likely that, unless such disclosure is made, a substantial body of consumers will be misled to their detriment? *Statement of Basis and Purpose for the Cigarette Advertising and Labeling Trade Regulation Rule*, 1965, pp. 89-90, 29 FR 8325 (1964).

Misleading "door openers" have also been found deceptive (Encyclopedia Britannica, 87 F.T.C. 421 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), *as modified*, 100 F.T.C. 500 (1982)), as have offers to sell that are not bona fide offers (*Seekonk Freezer Meats, Inc.*, 82 F.T.C. 1025 (1973)). In each of these instances, the truth is made known prior to purchase.

[38] In the Listerine case, the Commission held that pro forma statements of no absolute prevention followed by promises of fewer colds did not cure or correct the false message that Listerine will prevent colds. *Warner Lambert* 86 F.T.C. 1398, 1414 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

[39] *Chicago Metropolitan Pontiac Dealers' Ass'n*, C. 3110 (June 9,1983). [101 F.T.C. 854 (1983)]

[40] An opinion is a representation that expresses only the behalf of the maker, without certainty, as to the existence of a fact, or his judgement as to quality, value, authenticity, or other matters of judgement. American Law Institute, Restatement on Torts, Second ¶ 538 A.

[41] *Id.* ¶ 539. At common law, a consumer can generally rely on an expert opinion. *Id.*, ¶ 542(a). For this reason, representations of expert opinion will generally be regarded as representations of fact.

[42] "[T]here is a category of advertising themes, in the nature of puffing or other hyperbole, which do not amount to the type of affirmative product claims for which either the Commission or the consumer would expect documentation." *Pfizer, Inc*, 81 F.T.C. 23, 64 (1972).

The term "Puffing" refers generally to an expression of opinion not made as a representation of fact. A seller has some latitude in puffing his goods, but he is not authorized to misrepresent them or to assign to them benefits they do not possess [cite omitted]. Statements made for the purpose of deceiving prospective purchasers cannot p.)perly be characterized as mere puffing. *Wilmington Chemical*, 69 F.T.C. 828, 865 (1966).

[43] In *Avalon Industries*, the ALJ observed that the "'ordinary person with a common degree of familiarity with industrial civilization' would expect a reasonable relationship between the size of package and the size of quantity of the contents. He would have no reason to anticipate slack filling." 83 F.T.C. 1728, 1750 (1974) (I.D.).

[44] "A misleading claim or omission in advertising will violate Section 5 or Section 12, however, only if the omitted information would be a material factor in the consumer's decision to purchase the product." *Americ n Home Products Corp.*, 98 F.T.C. 136,368 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982). A claim is material if it is likely to affect consumer behavior. "Is it likely to affect the average consumer in deciding whether to purchase the advertised product-is there a material deception, in other words?" Statement of Basis and Purpose, *Cigarette Advertising and Labeling Rule*, 1965, pp. 86-87, 29 FR 8325 (1964).

[45] Material information may affect conduct other than the decision to purchase a product. The Commission's complaint in *Volkswagen of America*, 99 F.T.C. 446 (1982), for example, was based on provision of inaccurate instructions for oil filter installation. In its *Restatement on Torts, Second*, the American Law Institute defines a material misrepresentation or omission as one which the reasonable person would regard as important in deciding how to act, or one which the maker knows that the recipient, because of his or her own peculiarities, is likely to consider important. Section 538(2). The Restatement explains that a material fact does not necessarily have to affect the finances of a transaction. "There are many more-or-less sentimental considerations that the ordinary man regards as important." Comment on Clause 2(a)(d).

[46] In evaluating materiality, the Commission takes consumer preferences as given. Thus, if consumers prefer one product to another, the Commission need not determine whether that preference is objectively justified. *See Algoma Lumber*, 291 U.S. 54, 78 (1933). Similarly, objective differences among products are not material if the difference is not likely to affect consumer choices.

[47] The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality.

[48] Because this presumption is absent for some implied claims, the Commission will take special caution to ensure materiality exists in such cases.

[49] *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1980).

[50] *Cf. Restatement on Contracts, Second* ¶ 162(1).

[51] In *American Home Products*, the evidence was that the company intended to differentiate its products from aspirin. The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to purchasers." *American Home Products*, 98 F.T.C. 136, 368 (1981), *aff'd*, 695 F.2d 681 (3d. Cir. 1982).

[52] In *Fedders*, the ads represented that only Fedders gave the assurance of cooling on extra hot, humid days. "Such a representation is the raison d'etre for an air conditioning unit-it is an extremely material representation." 85 F.T.C. 38, 61 (1975) (I.D.), *petition dismissed*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976).

[53]"We note at the outset that both alleged misrepresentations go to the issue of the safety of respondent's product, an issue of great significance to consumers." *Firestone*, 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

[54]The Commission found that information that a product was effective in only the small minority of cases where tiredness symptoms are due to an iron deficiency, and that it was of no benefit in all other cases, was material. *J.B. Williams Co.*, 68 F.T.C. 481, 546 (1965), *aff'd*, 381 F.2d 884 (6th Cir. 1967).

[55]As the Commission noted in *MacMillan, Inc.*:

> In marketing their courses, respondents failed to adequately disclose the number of lesson assignments to be submitted in a course. These were material facts necessary for the student to calculate his tuition obligation, which was based on the number of lesson assignments he submitted for grading. The nondisclosure of these material facts combined with the confusion arising from LaSalle's inconsistent use of terminology had the capacity to mislead students about the nature and extent of their tuition obligation. *MacMillan, Inc.*, 96 F.T.C. 208, 303-304 (1980).

See also, Peacock Buick, 86 F.T.C. 1532, 1562 (1975), *aff'd*, 553 F.2d 97 (4th Cir. 1977).

[56]*Simeon Management Corp.*, 87 F.T.C. 1184 (1976), *aff'd*, 579 P.2d 1137, 1168, n.10 (9th Cir. 1978).

[57]In *American Home Products*, the Commission approved the ALJ's finding of materiality from an economic perspective:

> If the record contained evidence of a significant disparity between the prices of Anacin and plain aspirin, it would form a further basis for a finding of materiality. That is, there is a reason to believe consumers are willing to pay a premium for a product believed to contain a special analgesic ingredient but not for a product whose analgesic is ordinary aspirin. *American Home Products*, 98 F.T.C. 136, 369 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982).

[58]The prohibitions of Section 5 are intended to prevent injury to competitors as well as to consumers. The Commission regards injury to competitors as identical to injury to consumers. Advertising and legitimate marketing techniques are intended to "lure" competitors by directing business to the advertiser. In fact, vigorous competitive advertising can actually benefit consumers by lowering prices, encouraging product innovation, and increasing the specificity and amount of information available to consumers. Deceptive practices injure both competitors and consumers because consumers who preferred the competitor's product are wrongly diverted.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB21
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title "An Act relating to false statements in state election advertising..."
RDU Elections
Component Elections
Sponsor Representatives Ramras, Wilson
Requester (H) State Affairs
Component No. 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
If passed, this legislation will not have a fiscal impact on the Division of Elections.

Prepared by: Lauri Allred, Admin Assistant Supervisor
Phone 465-4611
Division Division of Elections
Date/Time 1/24/05 8:57 AM
Approved by: Laura A. Glaiser, Director
Date 1/24/2005
Agency Office of the Lt. Governor, Division of Elections

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 21
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to false statements in State election advertising
RDU: Alaska Public Offices Commission
Component: Alaska Public Offices Commission
Sponsor: Ramras
Requester: House State Affairs
Component No.: 70

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	•	•	•	•	•	•
Travel						
Contractual	•	•	•	•	•	•
Supplies	•	•	•	•	•	•
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	•	•	•	•	•	•
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	•	•	•	•	•	•
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	•	•	•	•	•	•

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	•	•	•	•	•	•
Part-time	•	•	•	•	•	•
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill seeks to establish a "truth in advertising" component to the Campaign Disclosure Law, AS 15.13. If enacted this bill may have substantial fiscal impact on the Public Offices Commission due to the broad nature of the new subject (false statements) for complaints. It is anticipated that several complaints will be filed under the new provision, however we are unable to determine the specific fiscal needs that will result from complaints alleging false statements in political advertising. Therefore, we are filing an indeterminate fiscal note at this time.

Prepared by: Brooke Miles, Executive Director
Phone 907-334-1726
Division: Alaska Public Offices Commission
Date/Time 1/24/05 4:15 PM
Approved by: Mike Tibbles, Deputy Commissioner
Date 1/24/2005
Agency: Department of Administration

(Revised 9/23/2004 OMB)

Louie Flora

Subject: FW: HB 21

-----Original Message-----
From: Brooke Miles [mailto:Brooke_Miles@admin.state.ak.us]
Sent: Monday, January 31, 2005 10:27 AM
To: Louie Flora
Subject: HB 21

Louie Flora
House State Affairs Committee Aide

Hi Louie. I'm sorry for the delay in writing to you concerning the number of phone calls regarding the factual accuracy of election campaign advertising that APOC received during the 2004 election cycle.
We received 50 - 75 phone calls regarding truth in political advertising. Some of them were regarding the federal election for Senate, over which APOC had no authority. The authority for Federal elections is held by the Federal Elections Commission. Based on the inquiries we received last year, we believe it would be a fair estimate to plan for 8 - 10 complaints being filed on this issue. As I testified before the Committee last week, this will have fiscal impact on the Commission's ability to keep up and to meet its mission. If you would like any additional information, please let me know.

Brooke Miles,
Executive Director
APOC

candidate is running may recover damages in an action in superior court under this section against the individual who made the telephone call, the individual's employer, and the person who contracted for or authorized the poll or calls to convince. However, the employer of the individual or the person who contracted for or authorized the poll or calls to convince is liable to the defamed candidate only if the employer or person authorized the statement to be made, knowing that it was false or with reckless disregard for whether it was false or not, as part of the poll or calls to convince.

(b) The court may award damages, including punitive damages. If the court finds that the result of the statement places the integrity of the election process in substantial doubt, the eligibility of the successful candidate to hold the office to which elected shall be determined as provided in AS 15.56.110(b) or, in the case of a candidate for governor or lieutenant governor, by impeachment under art. II, sec. 20, Constitution of the State of Alaska. (§ 1 ch 142 SLA 1996)

Sec. 15.13.100. Expenditures before filing. A political campaign expenditure may not be made or incurred by a person in an election or by a person or group with the person's knowledge and on the person's behalf before the date upon which the person files for nomination for the office which the person seeks, except for personal travel expenses or for opinion surveys or polls. These expenditures must be included in the first report required under this chapter after filing for office. (§ 1 ch 76 SLA 1974; am § 23 ch 189 SLA 1975; am § 25 ch 14 SLA 1987)

Sec. 15.13.110. Filing of reports. (a) Each candidate, group, and nongroup entity shall make a full report in accordance with AS 15.13.040 for the period ending three days before the due date of the report and beginning on the last day covered by the most recent previous report. If the report is a first report, it must cover the period from the beginning of the campaign to the date three days before the due date of the report. If the report is a report due February 15, it must cover the period beginning on the last day covered by the most recent previous report or on the day that the campaign started, whichever is later, and ending on February 1 of that year. The report shall be filed

(1) 30 days before the election; however, this report is not required if the deadline for filing a nominating petition or declaration of candidacy is within 30 days of the election;

(2) one week before the election;

(3) 105 days after a special election; and

(4) February 15 for expenditures made and contributions received that were not reported previously, including, if applicable, all amounts expended from a public office expense term account established under AS 15.13.116(a)(8) and all amounts expended from a municipal office account under AS 15.13.116(a)(9), or when expenditures were not made or contributions were not received during the previous year.

(b) Each contribution that exceeds $250 and that is made within nine days of the election shall be reported to the commission by date, amount, and contributor within 24 hours of receipt by the candidate, group, campaign treasurer, or deputy campaign treasurer. Each contribution to a nongroup entity for the purpose of influencing the outcome of an election that exceeds $250 and that is made within nine days of the election shall be reported to the commission by date, amount, and contributor within 24 hours of receipt by the nongroup entity.

(c) All reports required by this chapter shall be filed with the commission's central office and shall be kept open to public inspection. Within 30 days after each election, the commission shall prepare a summary of each report which shall be made available to the public at cost upon request. Each summary shall use uniform categories of reporting.

(d) *[Repealed, § 35 ch 126 SLA 1994.]*

(e) A group formed to sponsor an initiative, a referendum or a recall shall report 30 days after its first filing with the lieutenant governor. Thereafter each group shall report

within 10 days after tl
expenditures made du
of this section.

(f) During the year
the campaign disclosu

(1) a person who, u
15.13.100, indicates a
legislative office;

(2) a person who h
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(3) a person who c
legislative office at th

(4) a group or nong
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(§ 1 ch 76 SLA 1974; a
49 SLA 1993; am § 35
am §§ 16 — 18 ch 48
§§ 20 — 22 ch 1 SLA

Cross references. — F
enacting subsection (f), see
the Temporary and Special

Effect of amendments.
effective August 29, 1995, a

The first 1996 amendmer
substituted "primary" for
(f)(2).

The second 1996 amendi
1997, in subsection (a), ins
cable, all amounts expende
account established under
amounts expended from a
under AS 15.13.116(a)(10),
and, in subsection (c), dele
tence which read "the repo
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"shall be filed with the c
and."

The 1998 amendment, ef
stituted "a public office exp
legislative office account" a
ence substitutions in parag

The 2001 amendment, ef
stituted "general election"
paragraph (f)(2).

Disclosure requireme
The disclosure requiremen
unconstitutionally vague o
violate the constitutional r
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Sec. 15.13.112. Us
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may be used only to
expenses incurred by
activities, and in thos

(b) Campaign contr

(1) used to give a p

THE
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ARE
POOR
ORIGINAL
COPIES

(A) a billboard or sign; or

(ii) printed material, other than an advertisement made in a newspaper or other periodical;

(2) using a fictitious name or using the name of another. (§ 14 ch 48 SLA 1996; am § 17 ch 1 SLA 2002)

Effect of amendments. — The 2002 amendment, effective April 16, 2002, in paragraph (1) inserted "or nongroup entity" in subparagraph (A).

Sec. 15.13.086. Authorized makers of expenditures. An expenditure

(1) authorized by or in behalf of a candidate may be made only by

(A) the candidate; or

(B) the candidate's campaign treasurer or a deputy campaign treasurer;

(2) authorized by AS 15.13.067(3) by or in behalf of a group may be made only by the group's campaign treasurer. (§ 14 ch 48 SLA 1996)

Sec. 15.13.090. Identification of communication. (a) All communications shall be clearly identified by the words "paid for by" followed by the name and address of the candidate, group, nongroup entity, or individual paying for the communication. In addition, candidates and groups may identify the name of their campaign chairperson.

(b) The provisions of (a) of this section do not apply when the communication

(1) is paid for by an individual acting independently of any group or nongroup entity and independently of any other individual;

(2) is made to influence the outcome of a ballot proposition as that term is defined by AS 15.13.065(c); and

(3) is made for

(A) a billboard or sign; or

(B) printed material other than an advertisement made in a newspaper or other periodical. (§ 1 ch 76 SLA 1974; am § 22 ch 189 SLA 1975; am § 36 ch 100 SLA 1980; am § 15 ch 48 SLA 1996; am §§ 18, 19 ch 1 SLA 2002; am § 5 ch 1 TSSLA 2002)

Revisor's notes. — In 2009, "chairperson" was substituted for "chairman" in (a) of this section in accordance with sec. 95(3), ch. 82, SLA 2000.

Effect of amendments. — The 1996 amendment, effective January 1, 1997, added subsection (b).

The first 2002 amendment, effective April 16, 2002, in subsection (a) and paragraph (b)(1) inserted references to nongroup entities.

The second 2002 amendment, effective June 26, 2002, rewrote subsection (a) and substituted "communication" for "advertisement" in the introductory language of subsection (b).

Editor's notes. — From April 16, 2002 through June 25, 2002, this section read as follows: "Identification of communication. (a) All advertisements, billboards, handbills, paid-for television and radio announcements, and other communications intended to influence the election of a candidate or outcome of a ballot proposition or question shall be clearly identified by the words "paid for by" followed by the name and address of the candidate, group, nongroup entity, or individual paying for the advertising. In addition, candidates and groups must identify the name of their campaign chairperson.

"(b) The provisions of (a) of this section do not apply when the advertisement

"(1) is paid for by an individual acting independently of any group or nongroup entity and independently of any other individual;

"(2) is made to influence the outcome of a ballot proposition as that term is defined by AS 15.13.065(c); and

"(3) is made for

"(A) a billboard or sign; or

"(B) printed material other than an advertisement made in a newspaper or other periodical."

Collateral references. — Validity and construction of state statute prohibiting anonymous political advertising. 4 ALR4th 741.

Sec. 15.13.095. False statements in telephone polling and calls to convince. (a) A candidate who is damaged as the result of a false statement about the candidate made with knowledge that it was false, or with reckless disregard for whether it was false or not, made as part of a telephone poll or an organized series of calls, and made with the intent to convince potential voters concerning the outcome of an election in which the