

FTC Chairman Appoints New Director of the Bureau of Consumer Protection

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On April 14, 2009, Federal Trade Commission Chairman (the "FTC") Jon Leibowitz appointed David Vladeck as Director of the Bureau of Consumer Protection. Mr. Vladeck's appointment is consistent with the expectation that the FTC under the Obama Administration will increase consumer protection regulation and enforcement across industries to levels not seen by American businesses in years.

Professional Background

Prior to his appointment, Mr. Vladeck was a Professor of Law at Georgetown University Law Center. At Georgetown, he taught federal courts, government processes, civil procedure and First Amendment litigation. In addition, Mr. Vladeck co-directed the Center's Institute for Public Representation (the "Institute"), a clinical law program for civil rights, civil liberties, First Amendment, open government and regulatory litigation. Under Mr. Vladeck's direction, the Institute has urged the FTC to strengthen regulations in order to ensure that consumers are protected from unlawful business practices.

At the outset of his legal career, Mr. Vladeck spent almost 30 years with Public Citizen Litigation Group (the "Litigation Group"), including 10 years as Director. Public Citizen Litigation Group is the litigating arm of Public Citizen, which is a national, nonprofit consumer advocacy organization established by Ralph Nader to represent consumer interests in Congress, the executive branch and the courts. The Litigation Group specializes in cases involving health and safety regulation, consumer rights, access to the courts, open government and the First Amendment, including Internet free speech.

Mr. Vladeck is a graduate of Columbia University School of Law and obtained his L.L.M. from Georgetown University Law Center. He received his bachelor's degree from New York University.

Involvement in Federal Trade Commission Rulemaking and Guidance

While serving as co-director of the Institute, Mr. Vladeck worked to strengthen consumer protections and rights, in particular those of children. During his tenure, the Institute submitted comments to the FTC on a number of subjects related to children's privacy and security. Specifically, it submitted comments on the Online Behavioral Advertising principles recommending that all data collected about the online activities of persons under the age of 18 be considered sensitive and requesting the Commission consider flatly prohibiting collection of such information. In addition, the Institute also submitted comments to the FTC regarding food marketing. These comments called for greater

disclosure of information by food and beverage companies related to their marketing activities targeted to children and adolescents.¹ Chairman Leibowitz has expressed a similar concern with food and beverage marketing to children, including calling on industry to limit marketing of higher-calorie foods and beverages and encouraging restaurants to offer healthier low-cost menu items. We believe it is almost certain that this will be an area of significant interest for the Bureau of Consumer Protection.

During his time at Public Citizen Litigation Group, Mr. Vladeck co-authored a petition for rulemaking to amend the regulations implementing the Gramm-Leach-Bliley Act. These recommendations included providing consumers with improved notice and more convenient means of exercising their right to opt-out of information sharing. In particular, the petition called for a standardized or tightly modeled format for disclosures explaining the law and consumers' rights and for these disclosures to be clear and conspicuous, in consumer-friendly language, and located at the beginning of consumer notices. In addition, the petition requested the consumers' right to opt-out be indicated clearly on the top of the first page. As this example indicates, Mr. Vladeck's experience demonstrates a great interest in improving business communications with and disclosures to consumers, and further ensuring they occur in a consumer-friendly manner.

Relevant Litigation Experience

Mr. Vladeck has argued or participated as *amicus curiae* in a number of cases before the U.S. Supreme Court and federal courts of appeal focusing on the First Amendment, federal preemption, and consumer protection. His work has generally addressed increasing the protections provided consumers, expanding public access to government records, and protecting the rights of free speech.

First Amendment

Mr. Vladeck addressed First Amendment issues, particularly those involving commercial speech, in a number of cases before the Supreme Court. In one such case, Mr. Vladeck successfully argued that broad rules suppressing free expression, including legitimate commercial speech, infringe upon the free speech guarantees of the Constitution.² In addition, he has submitted *amicus curiae* on behalf of Public Citizen in a number of cases, including one in which he unsuccessfully argued that the Florida state Bar's restriction on advertising violated the First Amendment.³ These cases demonstrate Mr. Vladeck's interest in protecting the free speech guarantees of the Constitution, particularly those with implications on commercial speech.

Freedom of Information Act

Mr. Vladeck's litigation experience has also addressed Freedom of Information Act ("FOIA") issues. In cases before both the U.S. Supreme Court and the D.C. Court of Appeals he has argued for disclosure of information held by Federal Agencies. On behalf of the Public Citizen, Mr. Vladeck argued for the disclosure of certain commercial documents. However, the D.C. Circuit found that, while Public Citizen may have been entitled, under FOIA, to some documents submitted to the FDA where trade secrets were not involved, it was not entitled to documents containing confidential commercial information.⁴ In a separate case, Mr. Vladeck submitted an *amicus curiae* brief on behalf of Public Citizen arguing for disclosure of agency documents. The Supreme Court disagreed, finding that the information requested under FOIA qualified for the law enforcement exception even though the information was not originally compiled for law enforcement purposes when the response to the request was made.⁵

Cigarette Labeling

Mr. Vladeck has also been involved in a number of matters involving cigarette labeling, generally arguing for additional health warnings and potential consumer redress. In a case before the Supreme Court, Mr. Vladeck submitted an *amicus curiae* brief on behalf of the American Cancer Society arguing against preemption by federal cigarette labeling statutes. The Court found that, although federal cigarette labeling statutes preempted certain state common law claims, claims based upon the breach of an express warranty, intentional fraud and conspiracy were not preempted.⁶ In a case on behalf of Public Citizen, Mr. Vladeck successfully argued that, absent specific statutory authority, the FTC did not have the discretionary power to eliminate certain utilitarian items used for promotional purposes from carrying health warnings pursuant to the Smokeless Tobacco Act.⁷

Food and Drug

In line with his advocacy on behalf of the Institute requesting limits on food and beverage marketing, Mr. Vladeck previously represented the Secretary of the Department of Agriculture, supporting the Secretary's restrictions imposed on the sale of soft drinks in public schools.⁸ The D.C. Circuit found that, while the Secretary's decision to regulate soft drink sales was not arbitrary and capricious, the Secretary had exceeded his authority under the Child Nutrition Act by unduly restricting the time and place at which soft drinks could be sold.

Congressional Testimony

Mr. Vladeck has written extensively on the subject of administrative law and in particular, federal agency preemption. In congressional testimony, Mr. Vladeck has generally argued against broad federal preemption of state laws. In particular, he has indicated that "recent assertions of preemption of state law by federal regulatory agencies are, in the main, nothing less than an effort by the Executive Branch to arrogate power that properly belongs to Congress."⁹

Mr. Vladeck has also addressed preemption with regard to the FDA's regulation of drugs and medical devices. In particular, he has indicated the FDA's view that "FDA regulation of drugs and certain medical devices broadly displaces state liability law — is wrong as a legal matter" and that the ultimate decision about preemption is for Congress, not the courts, to make.¹⁰ He noted that the FDA's position is also wrong as a public policy matter. Mr. Vladeck believes the FDA cannot single-handedly assure the safety of all drugs and medical devices on the market, thus, consumers cannot depend on FDA regulation alone to protect them from unsafe or defective drugs and medical devices. He believes the potential for tort liability places an essential discipline on the market and is an essential complement to the FDA's work. Mr. Vladeck's congressional testimony demonstrates his confidence in private rights of action and the need for multiple enforcement mechanisms to improve consumer protection.

Kelley Drye & Warren LLP

The attorneys in Kelley Drye & Warren's [Advertising Law](#) practice group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

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¹Available at: *Food Industry Marketing to Children Report: Paperwork Comment*, FTC File No. P064504, on behalf of members of the Children's Media Policy Coalition, specifically Action Coalition for Media Education, American Academy of Pediatrics, Benton Foundation, Children Now, National PTA, and the Office of Communication of the United Church of Christ, Inc., filed May 18, 2007; *Food Marketing to Children Report: Paperwork Comment*, FTC File No. P064504, on behalf of members of the Children's Media Policy Coalition, specifically Action Coalition for Media Education, Benton Foundation, Children Now, National PTA, and the Office of Communication of the United Church of Christ, Inc., filed Dec. 21, 2006; *Food Marketing to Children and Adolescents Report to Congress Comment*, Project No. P064504, on behalf of members of the Children's Media Policy Coalition, including Action Coalition for Media Education, Benton Foundation, Children Now, National Institute on Media and the Family, and Office of Communication of the United Church of Christ, Inc., filed Apr. 3, 2006.

²*Edenfield v. Fane*, 507 U.S. 761 (1993).

³*Fla. Bar v. Went for It*, 515 U.S. 618 (1995).

⁴*Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280 (D.C. Cir. 1983).

⁵*John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989).

⁶*Cipollone v. Liggett Group*, 505 U.S. 504 (1992).

⁷*Public Citizen v. Federal Trade Comm'n*, 869 F.2d 1541 (D.C. Cir. 1989).

⁸*National Soft Drink Ass'n v. Block*, 721 F.2d 1348 (D.C. Cir. 1983).

⁹*Regulatory Preemption: Hearing Before the S. Comm. on the Judiciary*, 110th Cong., Sept. 12, 2007 (Statement of David C. Vladeck, Geo. U L. Center) (CIS-No. 2008-S521-10), available at <http://judiciary.senate.gov/imo/media/doc/07-09-12VladeckTestimony.pdf>.

¹⁰*Should FDA Drug and Medical Device Regulation Bar State Liability Claims?: Hearing before the H. Comm. on Oversight and Government Reform*, 110th Cong., May 14, 2008 (Statement of David C. Vladeck, Geo. U. L. Center), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhr56191/html/CHRG-110hhr56191.htm>.