CENTER FOR MEDICAL FREEDOM

A PROJECT OF
CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND

LAWRENCE D. PRATT
PRESIDENT

WILLIAM J. OLSON
GENERAL COUNSEL

370 MAPLE AVENUE WEST, SUITE 4
VIENNA, VIRGINIA 22180-5615
PHONE: (703) 356-6914
FAX: (703) 356-5085

JAMES A. PARKER
FOUNDING DIRECTOR
(1982-2015)

RICHARD B. DINGMAN
FOUNDING DIRECTOR
(1982-2014)

November 20, 2015

Office of the Secretary
Federal Trade Commission
Room CC-5610
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Subject: Comments on Homeopathic Medicine & Advertising

Gentlemen:

The Center for Medical Freedom ("CMF") submits the following comments pursuant to the invitation of the Federal Trade Commission ("FTC") for comments related to its September 21, 2015 workshop on homeopathic medicine and advertising.[1]

The Center for Medical Freedom is a project of the Conservative Legal Defense and Education Fund, which was founded three decades ago, in 1985, as a nonprofit, non-partisan educational organization incorporated under the laws of Virginia, and is tax-exempt under Section 501(c)(3) of the Internal Revenue Code.[2] CMF's mission is to educate members of the public about their right to make their own personal medical and healthcare choices, and their inherent right of self-defense to resist efforts by government at all levels to restrict and control those choices.

FTC Workshop and Request for Comments

The Federal Trade Commission hosted a public workshop on September 21, 2015, to evaluate advertising for over-the-counter ("OTC") homeopathic products. At that workshop, remarks were offered regarding: (i) the evolution and growth of the homeopathic industry; (ii) principles of homeopathy and how homeopathic drugs are defined; and (iii) various legal

---

[1] https://ftcpublic.commentworks.com/ftc/homeopathyworkshop/

[2] http://www.cldef.org/

issues that the FTC claims are presented by OTC homeopathic drug advertising and the effect of recent class actions against homeopathic product companies.

These comments relate to a variety of the issues raised by the FTC, but importantly also analyze the threshold issue, which is the FTC's authority to regulate this area at all, by its claiming "application of Section 5 of the FTC Act to advertising claims for homeopathic products."[3]

The FTC Workshop and request for comments should not be seen in isolation, but can only be viewed as part of an inter-agency cooperation with the Food and Drug Administration to impose new and repressive regulations over homeopathy. For a discussion of this broad new threat from both the FDA and FTC to homeopathy, *see* W. Olson and J. Morgan, "More Government than America Needs or Wants, Homeopathy 4 Everyone, September, 2015.[4]

FTC's Claimed Jurisdiction over Homeopathy.

The FTC conducted its workshop and invited these comments on homeopathy with respect to only one issue — to prevent **deceptive advertising**. As Commissioner Ohlhausen noted in her opening remarks:

> if any of you are looking for a discussion of the potential regulation of those who use or practice homeopathic medicine, you've come to the wrong place. We are just looking at issues related to **advertising**. [Ohlhausen, p. 7 (emphasis added).]

Accordingly, any statements at the FTC workshop, and any comments that may be filed which address subjects other than "deceptive advertising" are wholly irrelevant to this proceeding and must be disregarded.

The FTC's limitation of the scope of the hearings to "deceptive practices" focuses the hearings on its core authority. The FTC has been granted statutory authority to prohibit certain **"deceptive practices."** 15 U.S.C. section 45 (section 5 of the Act). Indeed, the FTC believes that its "consumer protection" authority derives from section 5 of the Act. (The FTC

---

[3] FTC June 1, 2015 Press Release, https://www.ftc.gov/news-events/press-releases/2015/06/ftc-host-september-workshop-washington-dc-examine-advertising

[4] http://hpathy.com/homeopathy-papers/more-government-than-america-needs-or-wants/. The true nature of the FDA's agenda to restrict health care choices can be found in numerous books, including J. Gormley, Health at Gunpoint: The FDA's Silent War Against Health Freedom (SquareOne Publishers: 2013).

also has the related authority to prohibit certain **"false advertisement."** 15 U.S.C. section 52 (section 12 of the Act).) *See* statutory appendix.

The FTC Exercises a Dangerous and Unconstitutional Blend of Legislative, Executive, and Judicial Power.

The FTC exercises each of three classic functions of government — the executive, the legislative, and the judicial:

- Legislative: The FTC Act provides the FTC with authority to legislate by creating "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 57a. Violation of such rules can result in imposition of civil penalties of up to $11,000 per violation.

- Executive: The FTC has general investigative authority with respect to its duties under the FTC Act, being authorized to "prosecute any inquiry necessary to its duties in any part of the United States." 15 U.S.C. § 43. The FTC also has subpoena power and may issue civil investigative demands.[5]

- Judicial: The FTC has the authority to conduct administrative adjudications, which involve factfinding in a trial-type setting, where administrative law judges may make findings which result in the imposition of fines, penalties, and injunctive remedies. *See* 15 U.S.C. § 45. Responding parties may appeal such findings to federal courts, but judicial review of FTC adjudications conducted by the courts is deferential, superficial and rarely provides any relief.

The FTC's exercise of executive, legislative, and judicial power was the type of fusion of powers which Montesquieu understood could easily lead to tyranny.

> When the **legislative and executive powers are united** in the same person, or in the same body of magistrates, **there can be no liberty**; because apprehensions may arise, lest the same monarch or senate should **enact tyrannical laws**, to **execute them in a tyrannical manner**.
>
> Again, there is **no liberty** if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would be

---

[5] The FTC's investigative powers are defined in sections 6, 9, and 20 of the FTC Act (15 U.S.C. secs. 46, 49, and 57b-1).

> then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals. [Baron de Montesquieu, The Spirit of Laws (1748) (emphasis added).]

The Founders drew heavily from Montesquieu in fashioning the structure of our constitutional republic. James Madison quoted Montesquieu in Federalist No. 47, adding:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that … [t]he **accumulation of all powers, legislative, executive, and judiciary**, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced **the very definition of tyranny**. [The Federalist (G. Carey & J. McClellan, eds.), Federalist No. 47 at 249 (emphasis added).]

Although the legitimacy of the Administrative State has been accepted by most Americans for many decades, this acceptance is now turning to skepticism. Important questions about the constitutionality of the powers of agencies like the FTC have been raised recently by Columbia Law School Professor Philip Hamburger. *See, e.g.,* P. Hamburger, Is Administrative Law Unlawful (Univ. of Chicago Press: 2014). Hamburger traces the lineage of administrative agencies back to the King's prerogative courts, including the Court of Star Chamber, which was abolished in England in 1641: "Just as English monarchs once claimed a prerogative power to make law outside acts of Parliament, so too the American executive now claims an administrative power to make law outside acts of Congress…. The similarities between administrative and prerogative legislation are striking." Hamburger at 31. Unfortunately, administrative agencies wielding unaccountable power continue to operate in the United States.

Statements in the Current FTC Workshop/Proceeding Evidence that the FTC is Exceeding What It Defined as the Permissible Scope of Its Investigation.

Focusing on issues well beyond "deceptive practices," Commissioner Ohlhausen speculated about the state of knowledge of Americans about homeopathy. She apparently believes that whether or not an ad is deceptive is determined by how uninformed a consumer may be:

> Do consumers know what they are buying when they purchase a homeopathic product? Today's workshop will examine the potential challenges that

> advertising for OTC homeopathic products pose for American consumers and possible solutions to addressing those challenges. [Ohlhausen, p. 7.]

However, it is a mistake for the FTC to believe it has the authority to find that non-deceptive ads are deceptive based on the subjective assessment that consumers are not thought smart enough to understand the product that they are buying. Even assuming the legitimacy of the FTC's mission to prevent deceptive advertisements, the FTC was not commissioned to be our national nanny — to protect Americans from themselves. Its statutory commission clearly does not extend that far.

Commissioner Ohlhausen went on to state:

> Under [sections 5 and 12 of the FTC Act], companies must have a **reasonable basis for making objective claims**, including claims that a product can treat specific conditions before those claims are made.....
> Thus, the FTC is interested in ensuring that the advertising for OTC homeopathic products **contains accurate and reliable information**.... [F]**or over 40 years, the FTC and the FDA have worked together collaboratively** to regulate the marketing of OTC products. [Ohlhausen, pp. 9-10.]

Although this is a concise statement of the position of the FTC for many years, it is directly contrary to the principle of law that puts on the person making the charge the burden of proof to demonstrate his charge. The burden of proof should not be placed on the advertiser to demonstrate the accuracy of the claims. Even though this peculiar shifting of the burden of proof from the federal administrative agency to the taxpayer may have come to be accepted as a general rule in some administrative cases, it certainly ill fits the situation of advertisements homeopathic remedies — because of their very nature.

Unlike allopathic toxic drugs, homeopathic remedies are not designed to act against specific diseases or illnesses. There are allopathic toxic drugs designed to address various conditions from ADHD, Arthitis, Asthma, Autism Spectrum Disorder, and Avian Influenza to Zoonotic Hookworm, Zoster, and Zygomycosis and of the scores of "Diseases and Conditions" in between, all carefully indexed by the Center for Disease Control.[6] If an allopathic toxic drug manufacturer wanted to advertise a drug to address one of these diseases, he might be asked to have evidence that his drug can cure, or at least assist with curing, the disease in question.

However, homeopathic remedies do not operate in this manner. Rather than acting directly on an illness, they trigger the body to restore itself to health. They utilize the body's powerful ability to heal itself that God designed for our protection. There is no homeopathic

---

[6] http://www.cdc.gov/DiseasesConditions/index.html

remedy specifically designed to address ADHD or Zoonotic Hookworm — although there are many remedies which address symptom patterns arising from those conditions.

Homeopathic remedies are selected to treat patterns of symptoms which are specific to an individual — not to a named disease. A person with Zoonotic Hookworm may exhibit a variety of symptom patterns, causing there to be a variety of remedies that may be helpful. However, there is no direct correlation between disease and homeopathic remedy, as there is a correlation between a disease or a physiological process and most allopathic drugs. As mentioned above, homeopathic remedies work by stimulating a person's immune system, or in other ways trigger the body to resist the threat and return the body to health.

One of the great rules of law is that, "When the reason for the rule does not apply, so also should not the rule." Applied here, since homeopathic remedies are fundamentally different from allopathic toxic drugs, it would be profoundly wrong for the FDA to apply the same standards for testing of homeopathic remedies, and it would be wrong for the FTC to apply the same standards (including shifting the burden of proof) for advertising. To allow the FDA and the FTC to be the arbiters of truth and supposedly what is good for Americans flies in the face of the American way, where each person is free to pursue his own course. Certainly in the area of healthcare, among the most personal of all decisions, each person should not be interfered with by the government at any level.

Surely, the American people do not need a federal agency to tell them they may not use a benign substance that helps them. Does the FTC view the American people as fools? Does the FTC view the vast numbers of people in the United States and around the world who use homeopathy as fools?

Was President William McKinley, a devotee of homeopathy, a fool needing the protection of government. President McKinley dedicated a statue to Samuel Christian Hahneman, the founder of homeopathy. That monument is listed on the National Register of Historic Places, and the National Registry states that Dr. Hahnemann, who was born in Meissen Saxony, was: "the first foreigner not associated with America's independence to be represented in sculptural form in Washington, D.C. [and] the second doctor to gain sculptural recognition."[7] The monument was approved by an Act of Congress on January 31, 1900 (31 Stat. 709) and was dedicated on June 21, 1900.[8]

---

[7] https://www.dropbox.com/s/d5w60cyxdj39qzn/Hahnemann%20Memorial.pdf?dl=0

[8] The National Registry further explains that Dr. Hahnemann "became disillusioned by the medical orthodoxy that relied on over drugging and bleeding [and that] homeopathy … revolutionized medicine during the nineteenth century … and some homeopathic practices became commonplace by the 1890s." *Id.* Now, much of the medical establishment continues to resent homeopathy, and some now would want the FDA to act on its behalf to block access

The foreword to an important book on the science of homeopathy by homeopath Dana Ullman, Discovering Homeopathy (North Atlantic Books: 1991) was written by Dr. Ronald W. Davey, Physician to Her Majesty Queen Elizabeth II. Is Dr. Davey a fool needing the protection of government? Dana Ullman devoted an entire book to those persons who have used and continue to use homeopathy, who do not believe themselves to be fools. Does the FTC believe that the likes of Mark Twain,[9] Coretta Scott King, Cindy Crawford, Vincent Van Gogh, David Beckham, Catherine Zeta-Jones and Mother Teresa, have lacked the ability to care for themselves using homeopathy? D. Ullman, The Homeopathic Revolution: Why Famous People and Cultural Heroes Choose Homeopathy (North Atlantic Books: 2007).

The great battle reflected in this FTC proceeding between Empiricism and Rationalism, from the days of the Greeks and Romans onward, is told in fascinating detail in the four-volume work of medical historian Harris L. Coulter, Divided Legacy: A History of the Schism in Medical Thought. A review of this fascinating literature reveals that there, truly, is nothing new under the sun.

Suggested Areas of Inquiry for the FTC

Assuming, *arguendo*, that the FTC has any legitimate authority in this arena, and now must decide how to spend its scarce resources on healthcare and medical matters, a few other areas could be suggested for inquiry.

1. The FTC could purchase the book Broken Hearts, (Johns Hopkins Press: 2013) authored by Harvard Professor David S. Jones. From that book it would learn that heart bypass surgery and angioplasty has over 1 million procedures each year, making it a $100 billion industry. The book details how little focus was placed on the risks of these procedures, and how little patients knew of even those risks. *See* Broken Hearts, at 14-20, 149-56. Should

---

to this health care option.

[9] Mark Twain certainly had little use for a government which seeks to control the people's health care choices. "The mania for giving the Government power to meddle with the private affairs of cities or citizens is likely to cause endless trouble, through the rivalry of schools and creeds that are anxious to obtain official recognition, and there is great danger that our people will lose our independence of thought and action which is the cause of much of our greatness, and sink into the helplessness of the Frenchman or German who expects his government to feed him when hungry, clothe him when naked, to prescribe when his child may be born and when he may die, and, in fine, to regulate every act of humanity from the cradle to the tomb, including the manner in which he may seek future admission to paradise." M. Twain, Official Physic (April 21, 1867)
http://www.twainquotes.com/mercury/OfficialPhysic.html

not the FTC enjoin all advertisements of these services, regardless of the fact that revenues from such procedures can make up 30 percent of a hospital's revenues? Broken Hearts, at 17.

Moreover, "patients with stable coronary disease expect a ten-year gain in life expectancy from angioplasty, even though no such benefit has ever been demonstrated." Broken Hearts, at 28. Should not the FTC be concerned with the deceptive advertising which causes such unrealistic and unsupported expectations?

2. Do patients who receive pharmaceuticals from Psychiatrists really understand the risks of those drugs. Psychiatrist Peter R. Breggin, M.D. makes the case that FDA-approved drugs such as Prozac, Xanax, Valium, lithium, and Ritalin are highly dangerous, and patients are never told of their dangerous side effects. *See generally*, P. Breggin, Toxic Psychiatry (St. Martin's Press: 1991). Moreover, once on these powerful FDA-approved drugs, now including even newer drugs such as Effexor and Cymbalta, have been begun, they are profoundly difficult to stop. Indeed, Dr. Breggin devoted another book to this topic. P. Breggin, Psychiatric Drug Withdrawal (Springer Publishing Co: 2013). If Americans knew the difficulty that they would have in stopping taking these drugs, would most of them ever have started? Was there false advertising involved?

3. Might the entire scientific community, when it represents opinion to be fact, be engaged in massive fraud? Does science of today really tell us what is truth — or only what government-favored scientists think to be true, today? And if so, should government use the its coercive powers to force compliance with today's truth, which could be proved untrue tomorrow. Harvard mathematician Samuel Arbesman, in his book The Half-Life of Facts, (Current: 2013) explains how knowledge changes over time, and how the pace of change is increasing. His is a book about scientometrics — or, the science of science. Medicine is certainly within the area contemplated by this book. In view of science being a fluid, never fixed, concept, it requires a profound degree of arrogance — or financial incentive — to ask for government to use its coercive powers to restrict health care choice in such circumstances.

Moreover, the new science of quantum biology may soon reveal how micro-doses of homeopathic remedies so powerfully act on the body. In their new book Life on the Edge: The Coming Age of Quantum Biology (Crown Publishers: 2014), co-authors J.J. McFadden and J. Al-Khalili, explains how scientific thought is limited by "Richard Feynman's famous dictum, "What I cannot create, I do not understand." Life on the Edge, at 83. Repeatedly, McFadden and Al-Khalili begin a topic with contextual observations showing how fast science is changing with comments such as "A few decades ago, most biologists would have …" and "Up until recently…." They tell us:

> the statistical laws of classical physics could not be relied on at the microscopic level … calculating that the magnitude of deviations from those laws is inversely proportional to the square root of the number of particles involved …. All the statistical laws of classical physics are subject to this restriction: they are true

> for objects consisting of very large numbers of particles, but they fail to describe the behavior of objects composed of small numbers of particles. [*Id.* at 54.]

And, they instruct us that once we enter the world of the super small, which would include homeopathy, that:

> we must leave our classical preconceptions behind and enter the weird world of quantum mechanics where objects can be doing two or a hundred things at once, can possess spooky connections and can pass through apparently impenetrable barriers. [*Id.*]

This is the time for federal regulators to step back and recognize new developments in, and the limitations of, science.

Placing Faith in Medicine

The enormous best seller by Robert S. Mendelsohn, M.C., Confessions of a Medical Heretic, (McGraw-Hill: 1979) revealed what modern medicine has become to the "experts." "We don't say we know our doctors are good, we say we have *faith* in them. We *trust* them. [But there is] ninety percent or more of Modern Medicine that we don't need… Modern Medicine can't survive without our faith, because Modern Medicine is neither an art nor a science. It's a religion." Confessions, p. xiii.

Even in Biblical Israel there was separation of church and state, and the state did not control medicine. *See* II Chronicles 19:11. Because man is created both spirit and body, medicine belonged to the priest or the church, not to the king or the State. *See* Leviticus 13 and 14. Medicine was, therefore, not subject to the licensing power of the state. *See* Mark 1:44 (After healing a leper, Jesus told the man to show himself to the priest, not to the king.)

Neither the FDA nor the FTC nor any other government agency has any jurisdiction to force the use of one school of medicine over another. They are private matters of religion and conscience, not public matters of politics and coercion.

A Concluding Lesson From History: William Trigg

The attack on alternative medicine by the establishment medical community is by no means a new development. Almost 400 years ago, London herbalist William Trigg encountered similar resistance from the British College of Physicians, which held a royal monopoly on practicing medicine, and rigorously prosecuted outsiders who treated the sick. In England, royal monopolies were protected by prerogative courts. In the United States, even without the benefit of law, monopolies are now often protected by administrative agencies.

The College particularly disliked Trigg's habit of treating people for free, at a time when doctor's fees were exorbitant and doctors regularly refused to see poor patients. In addition, Trigg had embarrassed other physicians by remaining in London during the Plague to care for his patients, while registered doctors had fled the city. Trigg was prosecuted on three separate occasions for aiding the sick without being a member of the College of Physicians. On the third trial, William Trigg was permitted to call his cured patients as witnesses in his defense, and it is reported that at least 100 of Trigg's patients remained outside the courtroom waiting to testify when his case was dismissed.

The FTC should take a lesson from the Trigg case. The case against homeopathy is not one that is made by persons choosing to use homeopathic products who are harmed by them. The case against homeopathy is made by first, those who want to run other people's lives, and second, those who compete with homeopathic products, but are losing in the marketplace. The FTC has no legal or moral authority to do the bidding either of persons who want government to act as if it were our mother, or on behalf of an industry that seeks to gain financially by manipulating government to put its competitors out of business.

Sincerely yours,

/s/
William J. Olson
General Counsel

Statutory Appendix

15 U.S. Code § 45 (Section 5 of the Act) -
Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade
(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

15 U.S. Code § 52 (Section 12 of the Act)
Dissemination of false advertisements

(a) Unlawfulness
It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement--
(1) By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services, or cosmetics; or
(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics.
(b) Unfair or deceptive act or practice
The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.