



COMPETITIVE ENTERPRISE INSTITUTE

December 16, 1999

Ms. Jodie Bernstein  
Director  
Bureau of Consumer Protection  
Federal Trade Commission  
CRC-40  
Washington D.C. 20580

**Re: Complaint of Deceptive Advertising by Ben & Jerry's Ice Cream**

Dear Ms. Bernstein:

Citizens for the Integrity of Science and the Competitive Enterprise Institute hereby request that your agency investigate and halt a current advertising campaign by Ben & Jerry's Homemade Holdings, Inc. entitled "Our Thoughts On Dioxin". This ad campaign touts the allegedly dioxin-free nature of Ben & Jerry's new "ECO-Pint" ice cream packaging; **however, it totally omits the fact that the ice cream in this packaging contains significant quantities of this supposedly toxic chemical.** We submit that this ad campaign is deceptive.

The ad campaign currently appears on the packages of at least four flavors of Ben & Jerry's ice cream, in a brochure distributed at the company's stores, and on the company's website. (<http://www.benjerry.com/dioxin.tmpl>; sample package and brochure are enclosed with this letter). The campaign publicizes the fact that Ben & Jerry's new ECO-Pints are made of unbleached, chlorine-free paper. Unlike bleached paper, this unbleached paper allegedly is produced without creating dioxin and other organochlorine byproducts.

The Ben & Jerry's brochure claims that these chemicals are "**some of the most dangerous chemicals known to man .... Released in water, they build up in the fatty tissues of fish and work their way up the food chain to us.**" The brochure claims that dioxin "**is known to cause cancer, genetic and reproductive defects, and learning disabilities.**" It states that the "**only safe level of dioxin exposure is no exposure at all.**" Similar language appears on the ice cream cartons and on the Ben & Jerry's website.

**If this is true, then Ben & Jerry's ice cream is unsafe.** According to recent tests by Citizens for the Integrity of Science (attached hereto and also set forth at <http://www.junkscience.com/nov99/benjerry.htm>) a sample of Ben & Jerry's World's Best Vanilla ice cream contained 0.79 parts per trillion of dioxin. This level is about 200 times greater than the "virtually safe dose" of dioxin determined by the U.S. Environmental Protection Agency. See attached report at n.4-5 and accompanying text. (Given dioxin's ubiquity in animal fats, it is almost certain that dioxin is present in all ice creams. See id. at n.10. The higher butterfat content of Ben and Jerry's ice cream, however, makes it likely that it has more dioxin than regular ice cream.)

As this ad campaign indicates, the dioxin-free production of ECO-Pints is apparently important to a significant segment of the company's actual or potential customers. But while the company highlights this attribute of its packaging, **it simultaneously omits any mention whatsoever of the fact that its ice cream itself contains significant levels of dioxin.** In this context, this omission is clearly deceptive.

Food items carry an implied warranty of safety. When Ben & Jerry's touts the alleged safety and purity of its ECO-Pint technology, the clear implication is that the ice cream in those packages meets these standards as well. In fact, however, it does not. Since Ben & Jerry's claims that the "only safe level of dioxin exposure is no exposure at all", a consumer reading this statement would reasonably conclude that their ice cream has no dioxin. But as the above test results indicate, this conclusion is simply wrong. **While Ben & Jerry's new packaging may be produced in a dioxin-free manner, their ice cream itself contains dioxin.**

The failure of the company's ads to make this is clear is "likely to affect a consumer's choice or conduct regarding" its products. FTC, *Policy Statement on Deception*, p.5 (letter from Chairman James C. Miller III to the Hon. John D. Dingell, Oct. 14, 1983). **Of those Ben & Jerry's customers, actual and potential, who might be attracted by this marketing campaign, a substantial portion would be unpleasantly surprised to learn that the ice cream in that packaging contains dioxin;** in particular, that it contains levels of dioxin far in excess of what EPA considers to be "safe."

The contents, after all, are the reason people buy the product. People eat the ice cream, not the packaging. (Devotees, of course, may well lick the packaging, but we doubt that even the most enthusiastic of them go so far as to chew it.)

As one leading scholar on advertising law has noted, there is a "well established principle ... that advertisers be held responsible for implied, as well as express, misrepresentations." I. Preston, *The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising*, 57 U. Cincinnati Law Review 1243, 1248 (1989). In evaluating the truthfulness of ads, "the proper way to analyze [their] overall impact is to see the ads as consumers see them ... rather than the way they might be technically analyzed." Id. at 1246. The FTC's own "Guides for the Use of Environmental Marketing Claims" expressly recognize the likelihood that, for multi-component

products, unqualified claims that apply to only one component will often be perceived as encompassing a product's other components as well.

We ourselves do not claim that Ben & Jerry's ice cream is hazardous, either to people or to the environment. In our view, the dangers of dioxin have been greatly overstated, and Ben & Jerry's ECO-Pint ad campaign is yet another example of this. Rightly or wrongly, however, many people do believe in these dangers. The Ben & Jerry's ad campaign is aimed at such consumers. For its ads to omit mentioning the dioxin content of its own ice cream is an act of material deception that should be investigated and remedied by this agency.

We look forward to your response. Please contact us if there is any additional information that we can provide.

Sincerely,

Sam Kazman  
General Counsel

encl: Ben & Jerry's sample ECO-Pint;  
Ben & Jerry's brochure, "Our Thoughts on Dioxin";  
laboratory test report.