2008 ANA

Compendium of Legislative, Regulatory and Legal Issues

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Report from ANA's Washington Office

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Report from ANA's Washington Office

Introduction

2008 was a very challenging year for ANA's Washington office. We responded to serious threats to advertising posed by legislation to reauthorize the Federal Trade Commission as well as to proposals from the Federal Communications Commission to change the rules regarding product placement and by Congress to mandate warnings in advertisements for children's toys. We worked to enhance self-regulation in the privacy arena and opposed legislation to impose sweeping restrictions on tobacco advertising as unconstitutional.

The following is a summary of the major legislative and regulatory issues affecting advertising in 2008:

1. Product Placement: The Federal Communications Commission (FCC) is considering major revisions to its disclosure rules for product placement. It is also considering new rules regarding product placement in children's programming. ANA has taken the lead in organizing a broad group of advertisers, agencies and media companies in responding to the FCC's proposals, arguing that the current disclosure regime is more than adequate to inform the public, and that the FCC's proposals are overbroad and may not withstand First Amendment scrutiny.

2. FTC Reauthorization: Senator Byron Dorgan (D-ND) proposed legislation to make the most extensive changes to the FTC's authority in nearly 30 years. His bill would make sweeping changes to the FTC's jurisdiction, enforcement and rulemaking powers. ANA was active in putting together a coalition of groups, which included the U.S. Chamber of Commerce and the American Society of Association Executives (ASAE) that met with members of the Senate Commerce Committee to describe the serious problems with the legislation. As a result of these concerns and the press of other business, the chairman of the committee, Senator Daniel Inouye (D-HI) decided not to push the legislation in 2008.

3. Privacy and Behavioral Advertising: Last December, the FTC released a staff draft of self-regulatory principles for online behavioral advertising. ANA and a large group of trade associations responded to the proposed self-regulatory guidelines. These comments called on the FTC to consider the benefits provided to consumers by online behavioral advertising and to apply the existing self-regulatory framework to online practices. We also actively and successfully opposed legislation in New York state that would have imposed onerous restrictions on online behavioral advertising. Finally, ANA has argued against a proposal by the Internet Corporation for Assigned Names and Numbers (ICANN) to

open up the current top level domain system to a virtually limitless number of character strings.

4. CPSC Reauthorization: Congress considered and passed legislation giving the Consumer Product Safety Commission (CPSC) broad new powers after a number of high profile problems with imported products. Early versions of the legislation would have imposed onerous and extensive warnings for advertisements (both print and online) for toys and games. Working with the National Association of Manufacturers (NAM), other trade groups, and a number of our member companies, we were able to obtain revisions that enhanced procedural protections for the ad community by allowing the CPSC to conduct a rulemaking to set warning requirements.

5. Food and Beverage Advertising and Obesity: In September, ANA and GMA submitted a report by Georgetown Economic Services (GES) analyzing Nielsen data on food, beverage and restaurant advertising to children. The study found that advertising on children's programming continues to decline. The FTC released a study that showed that ad spending to children in the food sector is also substantially lower than estimates made by the Institute of Medicine (IOM). We also continue to add members to the CBBB's Food and Beverage Advertising Initiative, which requires members to pledge to change the mix of advertising to children to include more advertising for lower fat and calorie options.

6. Direct-to-Consumer (DTC) Prescription Drug Advertising: Even though major new industry-supported restrictions on DTC advertising passed just last year, some members of Congress continue to call for more restrictions on DTC ads. In May, the House Energy and Commerce Committee Chairman John Dingell (D-MI) and Oversight and Investigations Subcommittee Chairman Bart Stupak (D-MI) called on industry to adopt a "voluntary" two-year moratorium on new DTC ads. After the 2008 elections, Congressman Henry Waxman (D-CA) was chosen as the new Chairman of the House Energy and Commerce Committee. Congressman Waxman has consistently been one of the key leaders calling for legislative restrictions on DTC advertising.

7. Tobacco Advertising: Major legislation granting the FDA authority over tobacco products and advertising passed the House of Representatives in July. Similar legislation has been reported out of the Senate Health, Education, Labor and Pensions (HELP) Committee. ANA, along with the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF) provided extensive written comments to Congress detailing the serious constitutional problems with the advertising aspects of the bill.

8. Green Marketing: The FTC announced its plans to revise its green marketing guidelines, first issued in 1992. ANA at that time played a role in the development of these guidelines. The FTC held a workshop in April that looked

into potential issues arising out of green claims in light of the changing climate and energy concerns and ANA continues to monitor this important advertising area.

9. Endorsement and Testimonial Guidelines: The FTC announced it was going forward with proposed changes to its endorsement and testimonial guidelines. The new guidelines would require substantiation of results that consumers would generally achieve ("generally expected results") through use of the product. In a 2007 filing with the FTC, ANA argued that such a move would raise serious constitutional issues. ANA intends to submit further comments in 2009.

10. State Advertising Taxes: Florida was once again ground zero for ad taxes. The State Supreme Court removed a proposed constitutional amendment from the November ballot that would have changed the way the state paid for schools, which would have required the legislature to come up with new sources of revenue, including a potential sales tax on advertising. Mississippi and Indiana also discussed changes to their state sales taxes. However, no ad tax provisions succeeded in moving forward in the state legislatures this year.

11. SAG/AFTRA Update: In the fall of 2006, the advertising industry's $2.5 billion three-year contract with SAG/AFTRA expired. That contract was based on an antiquated talent payment system that has been in place for more than five decades and does not reflect the tremendous changes that have taken place in the marketing landscape. Through the efforts of the ANA-AAAA Joint Policy Committee (JPC), the bargaining organization that represents ANA members in these talent negotiations, we avoided a strike and entered into an extension of that agreement with the unions through October 2008. The current agreement was recently extended further to March 31, 2009. ANA is working with the talent unions to modernize and improve the functioning of this key labor contract.

With a new political environment in Washington, 2009 promises to be extremely challenging. We continually post updates on current legislative, regulatory and legal issues on the Advocacy @ ANA page of our website, at http://www.ana.net/advocacy/content/advocacylanding.

Please contact us at 202-296-1883 or at the email addresses listed below if there are any questions you may have or issues you would like to see us cover:

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Election '08 and Its Impact on the Ad Community

The election of Barack Obama and the enhanced Democratic majorities in the House and Senate bring the legislative and executive branches under unified Democratic control for the first time since the "Republican Revolution" of 1994. With the Democrats presently firmly in the driver's seat and the Republicans forced to regroup after two successive Congressional election losses, we may see the most activist and regulatory-minded environment in Washington in a generation.

President Obama filled out most of his top-level Cabinet posts in record time (by contrast, President Bill Clinton did not make his first Cabinet picks until mid-December). A few of his choices pose interesting potential challenges for the advertising industry. One of his first picks after Election Day was a fellow Illinois Democrat, Rahm Emanuel, for White House Chief of Staff. Just a few months ago, then-Congressman Emanuel told a gathering of advertisers that prescription drug companies faced a choice – either retain their research and development tax credit or lose the ability to deduct the cost of advertising as an ordinary business expense. Additionally, the President's choice for the White House-based National Economic Council, Lawrence Summers, the former Clinton-era Treasury Secretary, criticized the deductibility of advertising expenses in a 1987 Senate Finance Committee hearing. The President has yet to name a new FTC Chairman, but is apparently considering appointing Julius Genachowski, a technology advisor to the Obama campaign, as the new FCC Chairman. This appointment may indicate a new FCC focus on technology issues.

The Senate has increased from a bare Democratic majority of 51-49 (including two independents, Senators Bernie Sanders (VT) and Joe Lieberman (CT), that caucus with the Democrats), to a 58-41 Democratic advantage (as of this writing, the Minnesota Senate race is still undecided). Similarly, the Democratic House majority increased from 235-199 prior to Election Day to 257-178. The enhanced majorities mean the Democrats will probably add committee seats in the House and Senate at the expense of the Republicans. The turnover on the major committees from retirements and election losses, coupled with a more regulatory-minded Congress, poses interesting challenges for our industry.

The Senate Commerce, Science and Transportation Committee will now be headed by Senator Jay Rockefeller (D-WV), who takes over from Senator Daniel Inouye (D-HI). Senator Inouye has agreed to take over the chairmanship of the Senate Appropriations Committee, where Senator Robert Byrd (D-WV) has agreed to take on emeritus status. Senator Rockefeller has long been a critic of violent and indecent programming, sponsoring legislation allowing the FCC to ban violent programming and prohibiting so-called "fleeting expletives." On the Republican side, Senator Ted Stevens (R-AK) was defeated for re-election and thus will not return to the committee as ranking member. Senator Kay Bailey Hutchison (R-TX) has served as the acting ranking member since Senator Stevens stepped down from his committee assignments due to his criminal indictment. Senator Hutchison was a co-sponsor of Senator Rockefeller's violent

programming legislation. It is expected, however, that Senator Hutchison will resign before the end of the 111th Congress to run for Governor of Texas.

There also will be a changing of the guard at the House Energy and Commerce Committee. Longtime Chairman John Dingell (D-MI), who has been the top Democrat on the panel since 1981, was defeated in the Democratic caucus by Congressman Henry Waxman (D-CA). Congressman Waxman has been a critic of the advertising industry since his early days in the House. He has sponsored legislation to severely restrict tobacco advertising, place a three-year moratorium on and require new warnings for DTC prescription drug ads, put over-the-counter drug advertising under FDA jurisdiction, and has urged the FCC to take a stronger stance against product placement. He is widely respected in Congress for his legislative acumen and is a close ally of Speaker Nancy Pelosi, a fellow California Democrat. President Obama has also named Waxman's former Chief of Staff, Phil Schiliro, to be Assistant to the President for Legislative Affairs. It is likely that Congressman Waxman's tenure will be even more proactive than that of the already activist approach of Chairman Dingell. Congressman Dingell, however, has been named by Chairman Waxman as the point person on the committee on national health care reform.

With the major changes the new Administration and Congress are bringing to both ends of Pennsylvania Avenue, 2009 looks to be very challenging for the advertising industry.

Advertising Tax Deductibility

Background

The federal government now faces extraordinary revenue pressures. An ongoing war, growing deficits, expanding entitlement programs, and financial turmoil are all putting extreme pressure on the federal budget. Advertising, which continues to be 100% deductible as a business expense, may see its tax benefits threatened in the search for additional revenue streams. We have not seen a full-scale federal ad tax battle since 1991. Nevertheless, due to the current economic trends, the likelihood of this type of tax initiative in the next few years is increasingly high.

Efforts to eliminate or limit ad deductibility, of course, ignore the major benefits of advertising to the U.S. economy. ANA has conducted a number of studies, the most recent by Global Insight, a major economic think-tank, in 2004. The Global Insight study, under the guidance of Nobel Laureate in Economics Lawrence Klein, found that the economic activity created by advertising surpassed $5 trillion and supported 21 million jobs annually. We are in the process of updating this data, which undoubtedly will show that advertising remains one of the key drivers of the U.S. economy.

Congressional Activity

Congressional activity in regard to advertising and taxes has focused on category-specific tax deductions for "controversial" advertising or to encourage specific behaviors. This included legislation by Representative Fortney "Pete" Stark (D-CA), which would deny the deductibility of Direct-to-Consumer prescription drug ads that fail to present a "fair balance" of risk and benefit information (H.R. 2823). Senator Tom Harkin also has consistently introduced legislation to deny the tax deductibility of tobacco advertising (S. 1342). In addition, a recent study published in the Journal of Law and Economics concluded that the elimination of the tax deduction for "fast food" advertising could lower obesity in the U.S. by 5 to 7%. This study can be viewed at http://www.journals.uchicago.edu/doi/abs/10.1086/590132?journalCode=jle.

Outlook for 2009

Not only is it likely that deficits will continue, but tax reform also remains an almost certain issue. In 2007, the Chairman of the House Ways and Means Committee, Representative Charlie Rangel (D-NY) introduced major tax reform that would end a number of corporate deductions. While this bill did not pass in the 110th Congress, tax reform remains one of Chairman Rangel's priorities and will most likely be reintroduced in the next Congress. It is likely that advertising will come up in the debate over corporate deductions, as it has been viewed in the past as an untapped major source of revenue. ANA will continue to work, individually and as part of The Advertising Coalition (TAC) (see page 42) to educate policymakers of the benefits of advertising's tax deductibility. As part of the TAC, we have helped coordinate a number of grassroots

meetings between members of Congress and local advertisers on a range of issues, including tax issues. We also hope to prevent the use of the tax code to punish certain categories of advertising that are seen as “controversial.”

State Advertising Tax Deductibility

Background

ANA traditionally confronts advertising tax proposals in a number of states each year. Over the last twenty years, ANA has helped defeat over 120 ad tax proposals in more than 40 states. We work with our sister associations (the American Association of Advertising Agencies and the American Advertising Federation) through the State Advertising Coalition (SAC) to respond to these threats. We also work closely with the broadcasters, newspaper publishers, magazine publishers and outdoor advertising groups in the states to explain why taxing advertising is a bad idea.

We are also members of The Advertising Coalition, which has developed the Global Insight Study, directed by Nobel Laureate in Economics Lawrence Klein. That study quantifies the economic impact of advertising in every state and congressional district in the country. This is a powerful tool for demonstrating why a tax on advertising is bad for the economy and businesses in the states.

Ad Tax Proposals in 2008

State governments faced serious budget pressures in 2008 due to the sub-prime lending crisis and the slowing of the economy. According to the Center on Budget and Policy Priorities, 29 states faced a total of more than $48 billion in combined shortfalls as they adopted their budgets for the current year. In general, states closed these budget gaps through some combination of spending cuts, use of "rainy day" reserve funds or revenue increases.

Despite the budget pressures facing many states, we were very fortunate that there were no serious ad tax proposals in any state legislature in 2008. The only major threat was a proposed constitutional amendment in Florida which could have led to a serious battle over taxing business services including advertising. Fortunately, that proposal was thrown off the November ballot by a unanimous decision of the Florida Supreme Court. Expanding the sales tax to more services was also discussed in tax reform commissions in Indiana and Mississippi.

Florida: In April, the Florida Taxation and Budget Reform Commission approved a proposed constitutional amendment, Amendment 5, to substantially revamp the way the state pays for schools. The amendment would have cut local property tax bills by at least 25% and required the Florida Legislature to replace the lost revenue, which is estimated to be at least $9 billion. The proposed amendment directed the legislature to choose among one or more of four options for making up the lost revenue: (1) repealing sales tax exemptions "which are determined not to advance or serve a public purpose;" (2) increasing the current sales tax rate by one percent; (3) imposing spending cuts in other state programs; and (4) generating "other revenues identified or created by the legislature." A one percent increase in the sales tax would raise only about $4 billion, so

there would have been considerable political pressure to repeal exemptions to make up the difference.

The proposed constitutional amendment was pushed through the Commission by former State Senate President John McKay, a longtime proponent of repealing the sales tax exemptions for various business services. The proposal was scheduled to be on the ballot in the November election. The tax swap would have taken effect on January 1, 2010.

A number of major industry groups in the state filed a lawsuit challenging the constitutionality of the proposal. On August 14th, a circuit court ruled that the ballot title and summary for Amendment 5 were misleading and ordered the proposal to be removed from the November ballot. Proponents appealed and just hours after hearing oral arguments on the appeal, the Florida Supreme Court unanimously upheld that ruling in September.

ANA worked closely with member companies and other industry groups to monitor developments on this proposal. Florida was once ground zero for advertising taxes. In 1987, the Florida Legislature passed a broad tax on all professional services, including advertising, but repealed it one year later after considerable industry lobbying. We were very concerned that passage of this proposed constitutional amendment could ultimately lead to a repeat of that battle over taxing advertising.

The former Senate President has fought this battle before. In January 2002, he proposed a bill to eliminate the sales tax exemptions for almost all products and services, including advertising time and space. On the last day of the session, the Legislature approved a proposed constitutional amendment to create a special legislative panel to review all sales tax exemptions, including the exemption for advertising services. That proposal was struck down by the courts and never made it to the ballot.

Senator McKay was term-limited out of office in 2002 but continued his battle as a private citizen. In 2005, he joined with former Comptroller Bob Milligan and former Attorney General Bob Butterworth to propose a similar constitutional amendment to repeal most business service exemptions. That proposal was also struck down by the courts and never made it to the ballot.

We are very pleased that the Florida Supreme Court ruled that proposed Amendment 5 would not be on the November ballot.

Indiana: Members of the Commission on Tax and Financing Policy, a group of lawmakers from both Houses of the Indiana General Assembly, have been discussing expanding the sales tax to more services in order to provide property tax relief to homeowners. So far, the focus seems to be primarily on taxing more personal services, such as haircuts, dry cleaning and auto repairs, rather than business services such as advertising.

Mississippi: The Mississippi Tax Study Commission, appointed in January by Governor Haley Barbour, recently recommended adding several business services, including advertising, to the list of taxable services. The report calls for taxing the professional services component of advertising, but not the cost of purchasing advertising time and space. In addition to advertising, the report recommended removing sales tax exemptions for graphic design services and photographic services as well as the exemption for newspaper and magazine sales.

Outlook for 2009

The serious fiscal pressures for many state governments are likely to continue for some time. New gaps have already opened up in the budgets of at least fifteen states for the current fiscal year. Experts believe the budget gaps will continue to grow as the continuing economic turmoil causes revenues to come in below estimates in more states. Unlike Congress, state governments must pass balanced budgets each year, so they must continue to cut spending, raise taxes or do some combination of both. Therefore, we expect states to consider new taxes on business services, such as advertising, to raise needed revenues.

We will continue to work with our member companies and other industry groups to oppose ad tax proposals in the states.

Direct-to-Consumer Prescription Drug Advertising

Background

Direct-to-consumer (DTC) prescription drug advertising is a highly controversial segment of the advertising industry. Critics of the practice contend that it substantially drives up the cost of prescription drugs. Other critics, including Dr. David Kessler, the former Commissioner of the Food and Drug Administration, compare DTC unfavorably to advertising for other consumer products while denying DTC advertising's demonstrated health benefits to consumers. These benefits have been documented by countless studies from the FDA, *Prevention* magazine, and the National Medical Association (NMA).

The pharmaceutical industry's trade association, the Pharmaceutical Research and Manufacturers of America (PhRMA) has responded to many of these criticisms by adopting strong self-regulatory guidelines. These guidelines urge companies to voluntarily submit their ads for FDA review and to balance the presentation between risk and benefit information. PhRMA announced a revision to these guidelines in late 2008 that addresses the use of celebrities in ads, the balance of risk and benefit information, and ad placement. The revised guidelines can be viewed at http://www.phrma.org/files/PhRMA Guiding Principles_Dec 08_FINAL.pdf.

Congressional Activity

Congress again was on the offensive against DTC advertising in 2008, despite the fact that the pharmaceutical and advertising industries won a major fight in 2007 defeating in both the House and the Senate the most serious limitations on DTC ever proposed. The industry worked together to defeat two- and three-year moratoriums on new drug ads, preclearance of ad content by the FDA, and Congressionally-mandated warning language.

However, in the just completed 110th Congress not only were bills once again introduced to attempt to impose a moratorium on DTC advertising and to deny the deductibility of DTC advertising, but also, for the first time, there was legislation to restrict over-the-counter drug advertising as well:

- *DeLauro-Emerson Bill:* Representatives Rosa DeLauro (D-CT) and JoAnn Emerson (R-MO) introduced a bipartisan bill to impose a three-year moratorium on new drug advertisements (H.R. 6151).
- *Stark Tax Deductibility Bill:* Rep. Pete Stark (D-CA) reintroduced his legislation to deny the tax deductibility of prescription drug advertising unless it presents a "fair balance" between benefit and risk information, and would also prohibit deductibility of new prescription drug advertising for two years (H.R. 2823). Congressman Stark is the second raking Democrat on the House Ways and Means Committee and the Chairman of its Health Subcommittee.

- *Kennedy-Waxman OTC Bill:* In late 2007, Senator Edward Kennedy (D-MA) and Representatives Henry Waxman (D-CA) and Tom Allen (D-ME) introduced legislation to extend the FDA's authority concerning prescription drug advertising to over-the-counter drugs (S.2311/H.R. 4083).

House Energy and Commerce Hearings on Drug Ads and Follow-Up Letters

In May, the House Energy and Commerce Committee's Oversight and Investigations Subcommittee, chaired by Representative Bart Stupak (D-MI), held a hearing that focused on the promotion of three prescription drugs – Lipitor, Vytorin and Procrit. At the hearing, the Chairman of the full Committee, Representative John Dingell (D-MI) repeatedly attempted to get the representatives from each company to commit to follow the AMA guidelines for direct-to-consumer prescription drug advertising, which include a moratorium that would be set by the FDA and require a "fair balance" between benefit and risk information. Committee Republicans, on the other hand, argued that the reforms passed last year should be given a chance to work.

In follow up letters to the CEOs of PhRMA, Johnson & Johnson, Merck, Schering-Plough and Pfizer, Dingell and Stupak urged the industry to adopt a "voluntary" two-year moratorium on DTC ads for new drugs, to add the FDA's MedWatch toll-free number to all advertisements, and to follow the AMA's guidelines. They also asked the companies whether they would be willing to add "black box" warnings to ads if urged to add such a warning to product labels by the FDA.

The Dingell-Stupak letters can be viewed at http://energycommerce.house.gov/Press_110/110nr282.shtml.

Study on DTC Effectiveness

In September, a study conducted by Harvard Medical School in conjunction with the Alberta Heritage Foundation for Medical Research found that prescription drug advertising had no effect on subsequent prescription rates of drugs. The study examined the rate of prescription patterns in the French-speaking province of Quebec, which is less exposed to English-language DTC advertisements from the United States media than the rest of Canada. *Advertising Age* posited that this study may demonstrate the limited effect DTC advertising ultimately has on prescription practices.

Merck Settlement With State Attorneys General

In May, Merck reached a $58 million settlement with 30 state attorneys general over the marketing of Vioxx. As part of the settlement, Merck agreed to submit all ads for new drugs to the FDA for preclearance. It also agreed to follow any FDA recommendations for a delay in airing television ads for pain relief drugs. The settlement can be viewed at http://www.merck.com/newsroom/vioxx/ pdf/ag_document.pdf. This settlement may

create precedents for further activities by state Attorneys General in subsequent cases concerning prescription drug companies.

Outlook for 2009

It is obvious that even though Congress passed substantial new restrictions on direct-to-consumer prescription drug ads in 2007, providing the FDA increased powers to restrict false or deceptive advertising, this category of ads remains a tempting target for certain members of Congress for further regulation. Therefore, we expect the issue to reemerge in the 111th Congress. Notably, President Obama voted, as a member of the Health Education, Labor, and Pensions (HELP) Committee for the Senate drug safety bill that contained serious ad restrictions. In addition, Vice President Joe Biden has supported removing the tax deductibility of advertising in general or for certain categories. We will continue to work with The Advertising Coalition (TAC) to educate members of Congress, both in meetings with staff and in grassroots meetings, about the significant public health benefits of DTC advertising. We are also active in defending the importance of DTC advertising in the media.

Food/Beverage Advertising and Obesity

Background

ANA, along with the entire food, beverage and restaurant industries, has actively been involved in the fight against obesity. The advertising industry has been proactive in responding to proposals for taxes, bans or restrictions on food marketing with stronger self-regulatory efforts. The most notable example was the creation of the Food and Beverage Advertising Initiative in 2007. The initiative now has 15 members who represent more than 80% of all children's food and beverage advertising. Each of the initiative's members has pledged to change how they target their advertising and limit the number of high-fat, high-sugar foods that are advertised to children. In the first year of the initiative, each of the members was able to meet their pledge obligations. More information concerning the initiative can be accessed at http://us.bbb.org/WWWRoot/SitePage.aspx?site= 113&id=dba51fbb-9317-4f88-9bcb-3942d7336e87

In addition, we have significantly strengthened our industry self-regulatory efforts through the Children's Advertising Review Unit (http://www.caru.org) to include online marketing and interactivity. The industry's public service arm, The Ad Council, also has been active in developing public service campaigns to respond to the childhood obesity problem.

ANA was the leader of the marketing sector of the Joint Task Force on Media and Obesity developed by Senators Sam Brownback (R-KS) and Tom Harkin (D-IA) and FCC Chairman Kevin Martin. However, the task force was unable to reach consensus on a final report.

Congressional Activity

The recent attempt to restore the FTC's unfairness authority in relation to children's advertising, which was removed by Congress in the late 1970's, continued in the 110th Congress. Senator Tom Harkin (D-IA) and Representative Tom Udall (D-NM) reintroduced their Healthy Lifestyles and Prevention America Act (or the HeLP America Act, S. 1342 and H.R. 2633) in 2007. These bills would return unfairness rulemaking authority to the FTC, as well as require the Department of Agriculture to set nutrition standards and exclude foods of "poor nutritional value" from the school lunch program. District of Columbia non-voting Delegate Eleanor Holmes Norton (D) also has legislation (H.R. 2278) to restore the FTC's unfairness authority.

Odds are good that these bills will be reintroduced in the 111th Congress.

FTC Report on Children's Advertising

In July, the FTC issued a report on food/beverage ad spending in all media. Its bottom-line finding was that the amount spent on food and beverage advertising to children aged 2-17 in 2006 was $1.6 billion. This figure is significantly lower than the Institute of Medicine's (IOM) 2004 estimate of $10-$12 billion. The FTC report also had positive comments about the industry's Food and Beverage Advertising Initiative.

CDC Funding

ANA has been part of a coalition that has lobbied for increased funding for the Center for Disease Control and Prevention's Division of Nutrition, Physical Activity and Obesity. This coalition included not only ANA and a number of large advertisers, but also the Center for Science in the Public Interest (CSPI), the Grocery Manufacturers of America, and the American Heart Association. Currently, the division has insufficient funds to provide funding to every state for obesity programs. We have argued that it should be increased to fund programs in all 50 states at least at minimal levels.

ANA/GMA Report

At a joint Senate Appropriations Subcommittee hearing in September, ANA and the Grocery Manufacturers of America (GMA) submitted a report from Georgetown Economic Services (GES) analyzing Nielsen Media Research data from 2007 on food, beverage and restaurant advertising to children. The report made a number of interesting findings:

- The average child saw nearly 10% fewer food and beverage ads on children's TV in 2007 than 2006, with a 25% decline since 2004.
- Spending for food, beverage and restaurant advertising, adjusted for inflation, is down 6% year-to-year.

Additionally, the report found that the mix of advertising has shown increased promotion of fruits and vegetables and bottled water, while ads for cookies and snacks have decreased. This analysis was an update to a study conducted by ANA and GMA last year. It can be viewed at http://ana.blogs.com/jaffe/2008/09/food-marketing.html. The trends in regard to food advertising to children consistently have been going downward over the last several years. In addition, due to the Food and Beverage Advertising Initiative, the composition of this advertising has been substantially altered to focus increasingly on products that are lower in fat, sugars, and calories. It is fair to say that the advertising and food sectors have done more to respond to the obesity challenge than any other group in the United States.

Two Reports on Food Advertising and Media

A study released in November by five health researchers, including Ezekiel Emanuel, the brother of White House Chief of Staff Rahm Emanuel, argued that advertising of "junk

food" on television should be limited in the name of preventing childhood obesity. The study alleged a link between high media consumption and obesity in children and teens. This study can be found at http://www.commonsensemedia.org/sites/default/files/CSM_media+health_v2c%20110708.pdf.

Another study released in November, using data from the 1970's to the 1990's concluded that a ban on "fast food" advertisements would reduce the number of overweight children ages 3–11 by 18% and would reduce the number of overweight adolescents ages 12–18 by 14%. It also argued that limiting the tax deductibility of food advertising would lower obesity rates, but at a lower percentage. This study can be viewed at http://www.journals.uchicago.edu/doi/abs/10.1086/590132?journalCode=jle.

Outlook for 2009

Because obesity continues to be a major public health issue, it is unlikely that attacks on food and beverage advertising will diminish in the new year. The industry must continue to educate policymakers on the positive things we are doing to help alleviate the obesity problem. Through both the Food and Beverage Advertising Initiative and stronger self-regulation, the industry has launched major efforts to meet the challenge. The Ad Council also has developed extensive public service ad campaigns in this area. We will try to increase these efforts in the coming Congress. Any restrictions, bans or taxes on food and beverage advertising would likely run afoul of the First Amendment's protection of commercial speech.

Privacy and Information Security

Background

The use of consumer information to carry out consumer targeting, better known as behavioral advertising, is a rapidly growing segment of internet marketing. This increasingly important practice has raised a raft of new privacy issues in addition to consumer concerns about spyware and data security, which have been claiming headlines for a number of years. The online marketing industry has been responding actively to these concerns with enhanced privacy policies and updated procedures to protect consumer data. Unfortunately, this reality has done little to satisfy critics on both sides of the aisle, who are pushing for more restrictions on the use of consumer data and the end to behavioral advertising.

FTC Behavioral Advertising Principles

Late in 2007, the FTC convened a townhall meeting examining privacy issues related to online consumer tracking. It examined the types of data collected and how it is used and how much consumers know about data collection practices and targeted marketing. The townhall was a follow up to another townhall first held in 2000. Just prior to the townhall meeting, a coalition of privacy and consumer groups proposed a "do-not-track" list similar to the "do-not-call" list. Representative Ed Markey (D-MA) also called on the FTC to investigate online behavioral tracking.

The FTC found, as a result of the townhall meeting, that despite its benefits, many consumers did not know about or understand behavioral targeting practices. It also noted the need for increased transparency and the fear that data could fall into the wrong hands. To address these concerns, in December 2007 the Commission released a draft framework of broad self-regulatory principles for behavioral advertising. The draft principles urged transparency in regard to the use of consumer information. The FTC also called for reasonable security and limited retention for consumer data. In addition, the FTC called for obtaining affirmative express consent for changes to privacy policies and when using "sensitive" data for advertising purposes. The FTC's principles can be viewed at http://www.ftc.gov/opa/2007/12/principles.shtm.

ANA, along with eleven other trade associations, filed detailed comments on the principles in April. We were instrumental in helping form the coalition that responded to the FTC. Our comments, written by Stu Ingis of the Venable Law Firm, urged the FTC to take into account the enormous benefits provided to consumers by online behavioral advertising. The comments also noted that the definition of behavioral advertising adopted by the Commission failed to differentiate adequately between personally identifiable, pseudononymous and anonymous data collection. In addition, the comments called on the Commission to not require choice for all collection practices, including those involving non-personally identifiable information, to allow flexibility in

any notice and choice requirements, and to apply the existing self-regulatory framework to behavioral advertising.

Our comments can be viewed at http://www.ana.net/advocacy/getfile/1364.

We have been exploring whether the current self-regulatory framework for advertisers is adequate, including how it relates to behavioral advertising.

New York State Behavioral Advertising Legislation

The New York Legislature considered two bills in 2008 that would have imposed serious restrictions on online behavioral advertising. The bills, Assembly Bill 9275-B and Senate Bill 6441-B, would subject all Internet advertising, no matter where it originated, to a strict set of notice, choice and security rules dealing with the use of non-personally identifiable information. These bills also failed to make relevant distinctions between the treatment of personally identifiable data and pseudonymous and anonymous data.

These bills set onerous requirements for marketers who collect and use personal information collected online, and also imposed impermissibly severe burdens on interstate commerce. These bills could lead other states to act in the behavioral advertising arena as well, creating a patchwork of inconsistent state regulation on the collection and use of non-personally identifiable information.

We wrote to the members of the relevant committees in the state legislature in opposition to these proposals. Those letters can be viewed at http://www.ana.net/advocacy/getfile/1374.

Congressional Activity

Congressional activity in 2008 remained focused on data security and spyware rather than an overall, omnibus privacy bill as was the case in the earlier part of the decade. There were two main data security bills considered in Congress. One was H.R. 964, or the Data Accountability and Trust Act (DATA Act) introduced by Representatives Bobby Rush (D-IL) and Cliff Stearns (R-FL). Their bill required companies to adopt reasonable security policies, provide notice in the event of a breach, and establish procedures to protect consumer information. The other bill was S. 495, the Personal Data Privacy and Security Act, introduced by Senator Patrick Leahy (D-VT), which imposed civil penalties on companies in the event they conceal data breaches. This bill passed out of the Judiciary committee in 2007 but failed to receive floor action.

As with data security, there were two main spyware bills in the 110th Congress. The first was legislation sponsored by Representatives Mary Bono (R-CA) and Ed Towns (D-NY) (H.R. 964, the SPY Act), which imposed penalties of up to $3 million for the surreptitious downloading of software without consumer consent and the collection of consumer data without notice. The second bill, sponsored by Representative Zoe Lofgren

(D-CA), would impose monetary penalties and prison sentences for damages caused by the installation of spyware.

ICANN Top Level Domain Proposal

In October, the Internet Corporation for Assigned Names and Numbers (ICANN) released details of a proposal to increase dramatically the number of generic top level domains (TLDs) (the word to the right of the dot, such as .com or .org) that are available to the public. ICANN's proposal would allow a company, group or individual anywhere in the world to purchase a new TLD that included virtually any word or phrase, including company or brand names. ANA's comments argue that that the proposal could impose major costs on advertisers in order to protect their brands and guard against brand infringement by squatters, domain name brokers, or even competitors. Marketers with multiple brands could be forced to spend thousands, and potentially in some cases millions of dollars to protect themselves. The comments can be found at http://www.ana.net/advocacy/content/1549.

Outlook for 2009

ANA and the advertising industry understand that protecting consumer privacy is highly important. Consumers must feel that their personal information is adequately protected, as the viability of online commerce depends on it. To further these goals, ANA has been actively involved in strengthening self-regulation to respond to consumer concerns about privacy and behavioral advertising. We hope that these self-regulatory programs will be allowed to work, in conjunction with the FTC's already strong enforcement powers in this area, before Congress attempts to step in to regulate even more extensively in the behavioral marketing arena. In the upcoming Congress the potential for an overarching privacy bill that ties all of these issues together in an overly restrictive manner remains a threat to undermine the effectiveness and efficiency of online advertising. ANA is working with other key players in the privacy area to examine, supplement, and strengthen existing self-regulatory privacy regimes.

Product Placement

Background

Product placement is a widely used practice that is almost as old as broadcasting itself. It involves the placement of brand name products in a movie or program. With audiences split among hundreds of channels and the rise of ad-skipping devices, broadcasters are increasingly turning to alternative means to help supplement the funding utilized to pay for programming. Paid product placement is becoming an important source of this funding. Product placements also serve to lend an air of reality to fictional (or in some cases, reality) programming. Federal Communications Commission (FCC) rules require that such paid promotional placements be disclosed at either the beginning or the end of the program in which they are contained. There are consumer groups and some Congressional representatives, however, that argue that the FCC's current rules are inadequate and are seeking substantial additional disclosures or even the end of product placement.

FCC Activity

Commercial Alert, a consumer activist group linked to Ralph Nader, wrote both the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) in 2003 asking the FTC and FCC to conduct a rulemaking requiring a notice to "pop up" on screen each time a product placement appeared in a television program. At the time, ANA responded to the FTC and FCC as part of the Freedom to Advertise Coalition (FAC), asking both agencies to decline the request. The Federal Trade Commission declined the request for action in February 2005, but the FCC failed to take any action.

A number of consumer and media activist groups from across the political spectrum, including the Campaign for a Commercial-Free Childhood, the Parents Television Council and Public Citizen, wrote the FCC in June 2008 urging it to issue a notice of proposed rulemaking (NPRM) regarding product placement. This came on the heels of a letter that Representatives Ed Markey (D-MA) and Henry Waxman (D-CA) sent to the FCC in late 2007 also asking for an inquiry into the practice. In response to these letters, and amid rumors that the FCC was going to take up the issue at an open commission meeting, the ANA joined with our sister trade associations in a letter asking the commission to instead consider a Notice of Inquiry (NOI). Our letter contended that the issues surrounding product placement were too varied and complex for the Commission to launch directly into a NPRM. Instead, we urged the FCC to gather information and data first through an NOI. This letter can be viewed at http://www.ana.net/advocacy/content/987.

Also in June, FCC Commissioner Jonathan Adelstein gave a speech at the Media Institute which urged that the Commission launch a formal NPRM into product placement, specifically looking into product placement on children's programming. His speech can be viewed at http://www.ana.net/advocacy/content/1254.

With public pressure mounting, later that month the FCC adopted a Notice of Inquiry and a Notice of Proposed Rulemaking regarding product placement (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-155A1.pdf). The NPRM/NOI asked for comment on a number of issues surrounding product placement. It contained questions regarding the adequacy of current disclosures for product placement and sought comment on whether there should be further regulation of product placement in children's programming. It also indicated that the FCC was considering a proposed rule change requiring mandated disclosures to have lettering of a specific screen size and to be displayed for a specific time duration.

ANA played a key role in assisting in putting together a coalition of 18 advertisers, agencies, and media companies to respond to the FCC's proposal. This group submitted comments drafted by Robert Corn-Revere of Davis Wright Tremaine LLP in response to the NPRM/NOI. Our 64 page comments urged the FCC to reject any new requirements on sponsorship identification announcements for product placement. We argued that the current requirements are more than adequate to inform the public. In fact, the proposals put forth by the FCC would be unnecessarily burdensome, both to broadcasters and to viewers. We also noted that not only are the FCC's proposals not needed, but would likely run afoul of the First Amendment, as they are extremely overbroad. In addition, our comments state that there is no showing that children are adversely affected by product placement in children's programming.

Our comments can be viewed at http://www.ana.net/about/getfile/14760.

Outlook for 2009

The FCC has received hundreds of comments in response to its NOI/NPRM. It will most likely take the FCC a while to digest these comments and to determine whether to come up with a final rule. We believe, however, that the FCC and FTC under present rules have the power to adequately regulate in this area. We hope that the FCC chooses to keep the existing rules in place and would oppose efforts to expand this authority.

Alcohol Beverage Advertising

Background

The alcohol beverage industry works extremely hard to ensure that its advertising is targeted to an age-appropriate audience. Each of the industry's trade groups – the Beer Institute, the Wine Institute, and the Distilled Spirits Council of the United States – has a strong self-regulatory code that dictates ad placement and ad content. Each of these codes embraces a 70% placement standard, meaning alcohol beverage ads only appear in programming or media that comprise at least a 70% adult audience. These codes also set limits on the age of spokespersons that can appear in ads and establish parameters for event sponsorships. Unfortunately, these steps have been insufficient in the eyes of some groups.

FTC Report on Self-Regulation

The FTC released in June its third report on self-regulation in the alcohol beverage industry, following up on reports issued in 1999 and 2003. The report concluded that self-regulation is largely effective but recommends that the industry expand the application of its 70% placement standard to the internet, movies, and other new media. However, FTC Commissioner Pamela Jones Harbour urged the industry to move to a 75% placement standard.

Alcohol Beverage Advertising and the FTC Reauthorization Bill

In section 13 of the FTC reauthorization bill introduced by Senator Byron Dorgan (D-ND) (S. 2831, discussed further on page 28), a provision required the FTC to report on alcohol beverage marketing self-regulation every two years (beginning two years from the date of its last report) and to make legislative recommendations to Congress. It also called on the FTC to include data on measured and unmeasured media by brand and type of beverage, and data on expenditures for slotting and discounting. ANA has opposed this proposal stating that while periodic reviews are appropriate considering the active cooperation of the alcohol beverage community on self-regulation a perpetual two year review is unnecessarily burdensome.

Judicial Activity

In March, the federal district court for the Eastern District of Virginia held that alcohol beverage advertising is protected by the First Amendment, even where a significant minority (in this case, 40%) of the audience is under legal drinking age. The case, *Educational Media Company at Virginia Tech v. Swecker*, involved two Virginia Alcohol Beverage Control regulations that mandated specific references to mixed drinks and prohibited ads in college student publications about alcohol beverages unless a dining establishment was also mentioned. The court, following the test set forth in the U.S. Supreme Court's landmark *Central Hudson* decision, found that the regulations were

overbroad and were insufficiently tailored to meet the government's interest in preventing underage consumption.

This case followed a 2004 Third Circuit case, *Pitt News v. Pappert*, where, in an opinion written by then-Circuit Judge Samuel Alito, the court struck down a Pennsylvania statute prohibiting alcohol beverage advertising in college publications.

Outlook for 2009

While there has not been much activity on the legislative front in recent years, with the FTC reauthorization bill likely to be reintroduced in the next Congress, it is probable that alcohol beverage advertising will once again be under the spotlight. ANA will continue to monitor this area carefully as alcohol beverage advertising still is one of the more controversial and scrutinized areas of advertising. However, any restrictions that would limit truthful, nondeceptive advertising to an adult audience in our view would not withstand judicial scrutiny.

Tobacco Advertising

Background

Tobacco advertising is evaluated, like almost every other advertising category, for false and deceptive claims by the Federal Trade Commission (FTC). However, such advertising is highly limited under the terms of the 1998 Master Settlement Agreement between 46 state attorneys general and the tobacco industry. Because this agreement is voluntary, it provides more restrictions on advertising than would be allowed under the Constitution of the United States through direct government action.

Commercial speech is afforded broad First Amendment protection by the courts. In the U.S. Supreme Court's landmark *Central Hudson* case, the Court held that restrictions on speech must be no more extensive than necessary to meet the government's asserted interest. Subsequently, the Court struck down a proposed rule by the Food and Drug Administration (FDA) that would have imposed dramatic limits on tobacco advertising, as well as similar state restrictions on tobacco advertising in the *Lorillard* case.

Against this legal backdrop, Congress consistently has considered a number of bills to impose the sweeping advertising restrictions of the FDA rule through legislation.

Congressional Activity

In 2008 the United States House of Representatives passed such a bill, the Family Smoking Prevention and Tobacco Control Act (H.R. 1108). This bill, sponsored by Representative Henry Waxman (D-CA), would transfer authority over tobacco products, including tobacco advertising and marketing, to the FDA and institute the provisions of the 1996 FDA tobacco advertising rulemaking. Experts from across the legal spectrum have noted that the unprecedented restrictions relating to advertising in the proposed rule would amount to a *de facto* ban on ads and violate the First Amendment.

Before the House Energy and Commerce Committee marked up the bill in April, ANA, along with the American Advertising Federation (AAF) and the American Association of Advertising Agencies (AAAA) sent a letter to the committee detailing many of the serious constitutional problems with the bill (the letter can be viewed at http://www.ana.net/advocacy/getfile/1305). At the markup, Representative Steve Buyer (R-IN) raised many of these same constitutional issues. Congressman Buyer specifically noted that the bill's restrictions would most likely violate the *Central Hudson* test as they were not the least restrictive means of meeting the government's ends, and that the Supreme Court struck down similar restrictions in the *Lorillard* case.

Despite these arguments, the final vote to report the bill to the House favorably was 38-12, with 11 Republicans joining the Democratic majority.

The full House of Representatives passed the bill on a 326-102 vote in July. The Senate Health, Education, Labor and Pensions (HELP) Committee reported similar legislation sponsored by HELP Committee Chairman Edward Kennedy (S. 625) in 2007, but the bill failed to receive floor action in the Senate. HELP Committee Ranking Member Mike Enzi (R-WY) has been critical of the House version of the bill as not going far enough, claiming that it "coddles Big Tobacco while protecting the industry's best tools to recruit and addict your children to tobacco."

Once again, Senator Tom Harkin reintroduced his Healthy Lifestyles and Prevention America Act (S. 1342) which would disallow the tax deductibility of advertising for tobacco products. Representative Tom Udall (D-NM) introduced similar legislation in the House.

Outlook for 2009

The display of bipartisan support for H.R. 1108 in 2008 makes it extremely likely that the bill will be reintroduced in the upcoming Congress. Notably, President Barack Obama voted to favorably report the bill during the 2007 HELP Committee markup. We will continue to educate members of Congress and their staffs about the serious constitutional problems with the bill and the likelihood that it would not withstand judicial challenge. We believe that the FTC remains best equipped to deal with any false or deceptive claims made in tobacco advertising.

FTC Reauthorization

Background

The Federal Trade Commission is the main regulatory body for advertising in the United States. Under Section 5 of the FTC Act, it has broad authority to prohibit "unfair or deceptive acts or practices." The FTC has used this power quite effectively to eliminate deceptive ads for weight loss products, stop telemarketing scams, and to protect consumer privacy.

It has long been ANA's belief that the FTC has sufficient power under Section 5 to stop false or misleading ads. The advertising industry also has one of the strongest self-regulatory programs in the United States under the auspices of the Council of Better Business Bureaus. Numerous past FTC Chairmen across the political spectrum, from Bob Pitofsky to Tim Muris to Deborah Majoras, have held up the CBBB and its National Advertising Division (NAD) and Children's Advertising Review Unit (CARU) as the "best example" and "model" of self-regulation in the world.

Congressional Activity

The Federal Trade Commission has not been reauthorized since 1996. In April, Senator Byron Dorgan (D-ND), with the support of Senator Daniel Inouye (D-HI), the Chairman of the Senate Commerce Committee, introduced the FTC Reauthorization Act of 2008 (S. 2831) to reauthorize the Commission. Along with increasing the FTC's authorization by 10% each year until 2014 to a level of almost half a billion dollars, the bill would make sweeping changes in the FTC's enforcement powers, which would have a dramatic effect on a broad range of industries, including the advertising industry. Here are the major changes S. 2831 would make to the FTC Act:

- It expands the Commission's authority to immediately impose civil penalties for any violation of the FTC Act. Currently, the FTC is limited to recovering civil penalties primarily for violations of a rule or a final cease and desist order with respect to an unfair or deceptive act or practice.
- It allows the agency, by a majority vote of the full Commission, to promulgate rules on any consumer protection matter under the expedited rules of the Administrative Procedures Act (APA), rather than under the more stringent procedures of the Magnuson-Moss Act.
- It allows state attorneys general to bring cases under the FTC Act to seek civil penalties, disgorgement or injunctions against bad actors.
- It repeals the telecommunications common carrier exemption, giving the Commission new authority to regulate telecommunications common carriers in the areas of advertising, marketing and billing.
- It expands the Commission's authority to regulate non-profits for unfair or deceptive acts or practices.

- It also includes provisions placing all federal banking agencies and non-profits under the FTC Act, giving the Commission new authority to promulgate rules regarding unfair or deceptive acts or practices in these industries.

ANA was quick to respond to this legislation. We were instrumental, in conjunction with the U.S. Chamber of Commerce, in putting together a coalition of trade associations and member companies in the affected industries to oppose the bill. We met with and alerted the relevant members and staff on the Senate Commerce Committee. We pointed out that this bill would be the greatest expansion of the FTC's authority since the 1970's, and that many of these proposals were considered and rejected by Congress in the past. Our efforts were successful in persuading the committee not to push the legislation in this Congress.

Outlook for 2009

With the housing and banking crises continuing to negatively affect the U.S. economy, it is likely that Congress will revisit many of these issues in 2009. We expect that Senator Dorgan will make a major push in the 111th Congress to pass this proposal. With a Congress and a White House that may be more regulatory-minded than we have seen in a number of years, the odds of passage of this type of extraordinarily broad legislation becomes much more likely. We will continue to work with industry groups and our members to ensure that lawmakers understand the benefits of the current regulatory framework for advertising. While some of the changes put forward in this legislation may be acceptable with some modifications, ANA will oppose a number of these proposals as overly broad and counterproductive.

CPSC Reauthorization

Background

The Consumer Product Safety Commission (CPSC) is the main guarantor of product safety in the United States. In the wake of problems concerning Chinese- manufactured products, including children's toys, Congress sought to expand the CPSC's authority and the resources available to address the dangers posed by these imports.

Congressional Activity

In late 2007, Senator Mark Pryor (D-AR) introduced legislation, S. 2045, that greatly increased the CPSC's authorization and gave it enhanced new powers to deal with violations, such as greater monetary penalties and enforcement by state attorneys general. Troubling to the advertising industry, however, were provisions in the legislation requiring manufacturers of children's toys or other products that contained small parts to carry relatively extensive warnings in advertisements, including in catalogs and on the internet, about the product's hazards. In February, Pryor and the ranking member of the Senate Commerce Committee, Ted Stevens, reached an agreement that was later introduced as S. 2663, which contained similar ad provisions.

ANA quickly responded to the Pryor-Stevens agreement with a letter to the United States Senate. Our letter made two arguments: (1) that requiring warnings everywhere a product is discussed is excessive and does nothing to enhance consumer safety, and (2) that the provisions posed serious First Amendment issues. Under the U.S. Supreme Court's *Central Hudson* test, restrictions on advertising must be "narrowly tailored" and "no more extensive than necessary." These provisions were clearly extremely broad and expansive, and could not be the government's first resort in achieving its desired aims. Our letter can be viewed at http://www.ana.net/advocacy/getfile/1301.

At the same time, the House was considering its own version of CPSC legislation, H.R. 4040. The House version contained provisions that limited the warning requirements to ads which provided a direct means of sale. Eventually, the Senate passed a version of the House bill which included the language limiting the requirements to ads providing a direct means of sale. After the House and Senate worked out the differences between their versions of the bill in a conference committee, legislation containing similar provisions was signed into law by President Bush in August.

In September, the CPSC released a draft version of its new advertising rules and asked for public comment. Specifically, the commission asked for input into a number of areas relating to the placement of the warnings and the impact on business. The rules can be viewed at http://www.ana.net/about/getfile/14750.

Outlook for 2009

The CPSC final rule took effect on December 12, 2008 for ads to be published beginning in February, 2009. We will continue to monitor developments at the CPSC to ensure that the final rules and their enforcement reflect both the letter and the spirit of the compromise language regarding the advertising provisions.

Endorsement and Testimonial Guidelines

Background

The use of endorsements and testimonials in comparative advertising is a long-standing practice. Currently, the guides allow marketers to use endorsements not generally representative of what consumers can expect from the advertised product so long as the marketers clearly and conspicuously disclose either (1) what the generally expected performance would be in the depicted circumstances, or (2) the limited applicability of the depicted results to what consumers can generally expect to receive. In 2007, the Federal Trade Commission announced planned changes to the guidelines governing endorsements and testimonials in advertising. These changes would require additional substantiation of generally expected results, eliminating a “safe harbor” for marketers using non-typical endorsements and testimonials. The FTC claimed that in making this change, it would eliminate false or deceptive consumer impressions generated by such claims.

ANA wrote to the FTC in opposition to the revisions, arguing that the current guidelines set an appropriate balance between the government's interest in protecting consumers and the interests of marketers in using endorsements and testimonials when communicating with consumers. We also argued that the Commission already has sufficient power under the FTC Act to penalize false or deceptive claims, and that to require pre-publication proof would in many instances place an unconstitutional burden on truthful, nondeceptive speech while providing little benefit to consumers.

In December, the FTC in a 4-0 vote of the Commission announced it was going ahead with a rulemaking to codify these proposed changes. In taking this action, the Commission largely discounted the constitutional arguments made in comments filed in 2007 by both ANA and other groups in response to the FTC's review of the guidelines (our comments can be viewed at http://www.ana.net/advocacy/content/695). The Commission, while making multiple references to our comments, contended that its interest in requiring further disclosure is to prevent deception. The FTC claimed that the new rules met the constitutional standard for restrictions on commercial speech laid out in the U.S. Supreme Court’s *Central Hudson* case, as the restrictions materially advanced a substantial interest, and since they would require information to prevent a misleading impression, they are reasonably tailored to meet that objective.

The Commission relied on two consumer surveys in formulating the new guidelines. In our original comments, we argued that these studies had numerous serious methodological and technical flaws. These concerns, unfortunately, were dismissed by the FTC, claiming that the studies provided "useful empirical evidence" regarding testimonial messages.

Outlook for 2009

ANA is planning to file further comments with the FTC on its Federal Register notice announcing the rule changes. Comments are due by March 2, 2009. We believe it is important for ANA to respond as these guidelines in themselves set a significant precedent and could impact on advertising outside the endorsement and testimonial area. There are many areas of advertising that rely on truthful statements which are limited by clear and conspicuous disclaimer information. These types of restrictions could easily be extended to these other types of advertising as well.

Green Marketing

Background

In the face of growing consumer concern and demand for environmentally friendly products and packaging, marketers and government are beginning to focus regulatory attentions on the green marketing area. A promotional trend long in the making, green marketing is the advertising and manufacturing of products assumed to be safe (or safer) for the environment. Green marketing provides an increased focus on numerous so-called "green" activities, including changes in production, packaging, advertising, and composition of goods, in ways claimed to be less detrimental to the environment than traditional practices. Regulatory organizations, however, have begun to focus on so-called "greenwashing" consisting of inaccurate or overblown environmental claims for products and services.

FTC Green Guides

In 1992, in an effort to prevent deception and unfairness in marketing of green products, the Federal Trade Commission (FTC) issued "Environmental Marketing Guides", also known as "green guidelines." Revised in 1998, the green guidelines aim to clarify how consumers are likely to interpret green marketing claims, thereby helping marketers avoid misleading the public with false or deceptive advertising. The guidelines direct that marketers substantiate and specify the expressed and implied claims about the environmental impact of their products and packaging and avoid general unsubstantiated claims of eco/ozone/environmental friendliness. Also, the Guides mandate that third party endorsement of a product must be explicitly detailed and be truly independent from the advertiser.

In addition to producing guidelines for marketers, the FTC, in cooperation with the Environmental Protection Agency (EPA), laid out tips for consumers to classify and interpret green advertising claims. This information specifies the different kinds of recycled products and materials, levels of toxicity and biodegradability, and the meaning of third party endorsements.

FTC Workshop

Despite the "greening" efforts of a rapidly growing number of companies, consumer skepticism is still substantial. Many consumers appear to feel that companies may be claiming their practices are "green" simply as a means of keeping up with current trends, and that the activities of many companies create environmental harm that continues to out-weigh their intended benefits. Due to the trendiness of "green" claims, consumers also have increasingly expressed a feeling of "green fatigue."

To address new green marketing issues, the FTC held a workshop to review its Green Guides in April. The main topic for discussion was determining whether the Guidelines

continue to be relevant in the face of new green marketing practices, as well as brainstorming about how to move forward in regulating present and potential practices. Because the notion of a "green product" is so loosely regulated, and therefore has very few boundaries, it was determined that more distinctions need to be made in the practice of green marketing, i.e. greater division must be presented between packaging tweaks versus major production overhauls.

Outlook for 2009

In the aftermath of the most recent FTC green workshop, as well as the increasing focus on energy independence and the fight against climate change, marketers will most likely face more regulation of green advertising practices in the future. President-elect Obama specifically stated during the campaign that he will "convert our manufacturing centers into clean technology leaders [and] establish a federal investment program to help manufacturing centers modernize and Americans learn the new skills they need to produce green products" (http://my.barackobama.com/page/content/newenergy). FTC staff and the advertising community's own self-regulatory systems have made clear that they have increased their focus on green claims, particularly surrounding the issue of carbon offsets. Additional regulation of green marketing and green practices is sure to be considered in the new Administration. ANA will continue to monitor this issue and fight for the rights of advertisers to appropriately market with adequate substantiation their environmentally enhanced products.

Loud Commercials Legislation

Background

In June, there was a large amount of media attention given to legislation by Representative Anna Eshoo (D-CA) regarding the volume of commercials on television. Congresswoman Eshoo's bill, the Commercial Advertisement Loudness Mitigation Act (or the CALM Act, H.R. 6209), would require the FCC to set guidelines mandating that the volume of commercials not substantially exceed the average sound levels of the programming during which they are aired. Two companion bills were introduced in the Senate by Senator Roger Wicker (R-MS) (S. 3156) and Senator Charles Schumer (D-NY) (S. 3154).

ANA's Washington office fielded a substantial number of telephone calls and emails from consumers complaining about loud commercials and in support of the legislation. We have taken these issues to ANA's Television Advertising and Production Management Committees and are working on an industry response to the bill.

Outlook for 2009

Representative Eshoo's proposal did not pass in the 110th Congress, but considering the nature and extent of consumer complaints, it appears she will push for it in the next Congress. We will continue to work with the appropriate ANA committees to respond to consumer concerns. There are efforts already underway to develop technological procedures to avoid excessive loudness as part of the TV digital conversion process, and ANA will participate in this industry initiative.

International Developments

Background

ANA regularly follows and responds to issues on the international level. We are a member of the World Federation of Advertisers (WFA), which is an association of national trade associations and large international advertisers that "provides global leadership by championing good practice, anticipating trends, and promoting the benefits of marketing communications."

German Advertising Code

In June, the German Ministry of Health issued a 56-page action plan to deal with childhood obesity. One of the numerous aims of the plan is to end advertising to children under 12, and to work with companies and the German self-regulatory advertising body to set rules for advertising to children older than 12. The plan intends to cover online and mobile marketing as well as traditional forms of advertising.

Brazilian Ad Ban

The Standing Committee on Consumer Protection of the Brazilian Chamber of Deputies passed legislation in July that would ban the marketing of any products and services to children under 12 and severely restrict marketing to children between 12 and 18. It also set forth practices that it deemed "unacceptable" to use in marketing that were said to especially appeal to children under 12.

European Parliament Obesity Report

A report on nutrition, overweight and obesity approved by the European Parliament in September recognized the role of self-regulation in fighting obesity rather than call for advertising restrictions. The WFA played a significant role in getting the report to focus on the benefits of self-regulation and acknowledging industry's shift to a balance of advertising for healthier foods. The report is non-binding on members, but may influence future actions in member states in regard to obesity and self-regulation.

International Tobacco Treaty

The World Health Organization completed work on an international treaty in 2003 that requires signatories to prevent tobacco companies from having a say in public health policies. Over 160 countries have signed the treaty, including the United States, but the Bush Administration did not send it to the Senate for ratification. Then-Senator Obama urged that the administration take this action in 2005, which means it is possible President Obama will ask the Senate for its assent.

Outlook for 2009

As regulations formulated abroad may be imported to the United States, we actively monitor developments overseas for trends in the current regulatory environment. We will continue to respond to such threats as needed, to educate policymakers about the value of advertising.

Legal Issues

Background

ANA actively tracks cases in both the state and federal courts that affect the rights of advertisers to promote their products. In many instances, we have participated in these cases, either as a party or through a "friend of the court" (*amicus curiae)* brief. We believe it is important to intervene in many of these cases to ensure that the courts hear key arguments about the First Amendment rights of advertisers. Over the past thirty plus years, the protections afforded commercial speech have been significantly strengthened.

Recent Developments

The United States Supreme Court is considering a number of cases in its current term that may have an impact on the advertising industry:

Altria Group v. Good
Oral arguments in this case kicked off the Court's new term on the first Monday in October. At issue was whether federal law relating to cigarette labeling preempts state law relating to claims that "light" cigarettes are less dangerous due to the lower tar and nicotine levels. A class action lawsuit was filed in Maine federal court under Maine Unfair Trade Practice law alleging that Philip Morris had falsely represented light cigarettes as safer than regular cigarettes. They alleged that the health benefits were offset by smoking more. The federal district court dismissed the suit on preemption grounds, but the First Circuit Court of Appeals in Boston reinstated it, claiming that Philip Morris's duty not to deceive consumers was covered by state law, whereas the federal law covered health claims.

A divided Supreme Court affirmed the First Circuit's decision in December, holding that the suit alleging the deception as to the safety of "light" cigarettes could go forward under Maine consumer protection law. Justice John Paul Stevens, writing for the court, held that federal preemption is to be narrowly construed and that the federal labeling act did not preempt their claims of fraud and deception. A strenuous dissent by Justice Clarence Thomas, joined by the Chief Justice and Justices Scalia and Alito, contended that the alleged false and deceptive statements were directly related to the health risk of smoking and thus the suit was preempted by federal law.

The Court's opinion can be viewed at http://www.supremecourtus.gov/opinions/08pdf/07-562.pdf.

Wyeth v. Levine
This case involves FDA-approved warnings on an anti-nausea drug that was improperly injected into a patient's arm, causing gangrene and requiring it to be amputated. The lower courts found that the warnings were insufficient as they related to the risk that improper injection could lead to gangrene. On appeal, Wyeth argued that since the FDA

approved the label, any lawsuits by consumers in state court are barred. It is represented in the case by former Solicitor General Seth Waxman, and the FDA has joined the case in support of Wyeth.

Oral arguments in this case led off the Court's November sitting. It has yet to issue an opinion.

FCC v. Fox Television Stations
In 2004, the Federal Communications Commission changed its policies regarding so-called "fleeting expletives," making any broadcast of an expletive, even inadvertent, a violation of its indecency rules. Up until this change, the FCC had followed the policy it adopted after the Supreme Court's landmark *Pacifica* ruling (the famous "seven dirty words" case), and issued fines against broadcasters only for repeated indecency violations. The FCC then proceeded to levy substantial fines against broadcasters that had aired live events where such fleeting expletives were used. However, the Second Circuit Court of Appeals overturned these fines and raised questions about the FCC's indecency actions as they relate to the First Amendment. The Commission appealed to the Supreme Court.

This case was also argued during the Court's November sitting, but an opinion has not been forthcoming.

Outlook for 2009

ANA will be watching the Supreme Court with great interest in regard to these issues in the coming months, as these cases may have an impact on commercial speech law. It is important for all advertisers that the rights afforded by the First Amendment remain strong and fully protected.

SAG/AFTRA Contract Negotiations

ANA, along with the American Association of Advertising Agencies (AAAA), conducts contract negotiations with SAG and AFTRA through the Joint Policy Committee on Broadcast Talent Negotiations. These contracts determine the payment of talent in advertising production and placement.

In the fall of 2006, the advertising industry's $2.5 billion three-year contract with SAG/AFTRA expired. The current SAG/AFTRA contracts are based on an antiquated talent payment system that has been in place for more than 50 years and do not reflect the tremendous changes that have taken place in the marketing/media landscape. In 2006, after extending the existing contract for two years to October 2008, the JPC and the unions agreed to conduct a joint study to determine how to revamp the compensation models to bring them up to date and to provide a more-measurable return on investment critical in today's business environment.

Booz Allen Hamilton (BAH) has developed two compensation models, and the JPC conducted a number of seminars/webinars in 2008 to evaluate those models. Those seminars were open to both industry and union participation and were very well attended.

Due to some outstanding issues, the JPC, in conjunction with SAG and AFTRA, secured a six month extension to the current contracts. The current contract now expires at the end of March 2009.

Coalitions

ANA remains an active member of The Advertising Coalition; the Alliance for American Advertising; the Freedom to Advertise Coalition (FAC); the State Advertising Coalition (SAC); and the Coalition for Health Care Communication (CHC). These coalitions enhance the efforts of the diverse groups that share the common interest of protecting the rights of advertisers. They provide the industry with a more unified front when lobbying Congress and government agencies, and serve to strengthen our individual efforts.

The Advertising Coalition

The Advertising Coalition was established in 1988 to direct the fight against federal advertising tax proposals. It has since expanded its scope to include general advertising issues. In 2004, the Coalition sponsored the Global Insight study, which demonstrated the enormous impact of the advertising industry on the national economy. There are currently eight member associations including: the ANA; the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); the Grocery Manufacturers of America (GMA); the Magazine Publishers of America (MPA); the National Association of Broadcasters (NAB); the National Cable & Telecommunications Association (NCTA); the Newspaper Association of America (NAA); and the Pharmaceutical Research and Manufacturers of America (PhRMA).

In 2008, The Advertising Coalition played an important role in defeating burdensome new restrictions on DTC prescription drug advertising.

The Alliance for American Advertising

Leaders in the advertising and media industries have created The Alliance for American Advertising (AAA) to demonstrate to policymakers and to the general public the commitment of the advertising industry to responsible advertising. The Coalition consists of major national advertisers, manufacturers, and advertising and media professionals who are prepared to increase their already significant efforts to educate the public on the general causes of obesity and support effective ways to reverse this trend.

The ANA, along with the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); and the Grocery Manufacturers of America (GMA) are charter members of the AAA. Other members include the Snack Food Association, the National Restaurant Association (NRA), the Magazine Publishers of America (MPA), the Point of Purchasing Advertising International (POPAI), the National Cable & Telecommunications Association (NCTA), the National Association of Broadcasters (NAB), General Mills, Inc., Kellogg Company, Kraft Foods, Inc., and PepsiCo, Inc.

The Alliance has been instrumental in setting up grassroots meetings between members of Congress and local advertisers to educate members on a number of concerns relating to advertising.

Freedom to Advertise Coalition

The Freedom to Advertise Coalition (FAC) is an informal coalition whose purpose is to oppose proposals that restrict truthful and non-deceptive advertising for any legal product or service. FAC's members include the ANA and the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); the Magazine Publishers of America (MPA); the Direct Marketing Association (DMA); the Newspaper Association of America (NAA); the Outdoor Advertising Association of America (OAAA); the National Retail Federation (NRF); and the Point of Purchasing Advertising International (POPAI).

State Advertising Coalition

The ANA, the American Association of Advertising Agencies (AAAA), and the American Advertising Federation (AAF) formed the State Advertising Coalition (SAC) in 1986 to provide information and resources necessary to combat overly restrictive state and local advertising proposals. Since its formation, SAC has responded to more than 120 ad tax proposals in over 40 states. Our activities on the state level in 2008 are detailed on page 10.

Coalition for Healthcare Communications

The Coalition for Healthcare Communications (CHC) was formed in 1991 for the purpose of defending organizations that dedicate their time to provide truthful information about pharmaceutical and medical products without inappropriate government intervention. The CHC advocates the flow of this information to health professionals and consumers for educational purposes so that prescription drugs and medical devices can be used efficiently and safely. The members of CHC include the ANA; the American Association of Advertising Agencies (AAAA); the American Advertising Federation (AAF); American Business Media; the American Medical Publishers Association (AMPA); the Association of Medical Publications (AMP); the Healthcare Businesswomen's Association (HBA); the Healthcare Marketing and Communications Council (HMC Council); the Medical Marketing Association (MMA); the Midwest Healthcare Marketing Association (MHMA); and the Public Relations Society of America (PRSA). More information about the CHC can be found at http://www.cohealthcom.org.

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