

Compendium of Legislative, Regulatory, and Legal Issues

2010

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2010 Compendium of Legislative, Regulatory and Legal Issues

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Report from ANA's Washington Office

Introduction

2010 was a particularly challenging year for ANA and the advertising community. We faced and were successful in defeating a proposal in the financial reform bill that would have drastically expanded the power of the FTC and significantly hurt the interests of advertisers. Privacy and behavioral advertising issues also heated up significantly, with two subcommittee Chairmen in the House of Representatives introducing comprehensive online and offline privacy legislation which could have had wide-ranging effects on the advertising community.

The FTC and the Department of Commerce both released privacy reports in December, which contain proposals for far-reaching regulations on behavioral advertising. Threats to food advertising, DTC prescription drug advertising, and advertising tax deductibility also surfaced. The tax deductibility issues alone confronted the advertising community with potential multi-billion dollar increases in tax liability. Our industry also was active in continuing to develop and implement self-regulatory programs in the food marketing and behavioral advertising arenas. The 2010 midterm elections brought about major political changes with a substantial shift in control of the House of Representatives and narrowed the Democrats' majority in the Senate.

Below is a summary of our activities in some of these key areas:

1. Advertising Taxes and Direct-to-Consumer Prescription Drug Advertising: The tax deductibility of drug advertising continues to be threatened. A number of major congressional leaders in both the House and Senate suggested eliminating the tax deductibility for prescription drug advertisements as a means to pay for health care reform during the long debate that led up to the passage of President Obama's health care plan. These proposals were estimated to cost advertisers more than \$37 billion over the next decade in increased tax assessments. Through the efforts of ANA and others in the advertising community, these proposals were ultimately defeated. In March, the FDA proposed to change its rulemaking on requirements for disclosure of prescription drug side effects in prescription drug advertisements. ANA filed detailed comments on these proposed changes.
2. Wall Street Reform and the FTC: Alongside the very contentious health care reform debate that consumed most of 2009 and early 2010, Congress took up controversial legislation designed to reform the financial services sector of the economy. Early provisions in the House version of the bill called for a dramatic expansion of the FTC's powers, both in regard to rulemaking and civil penalty authority. The civil penalty provisions could have faced advertisers with

immediate multi-million dollar penalties. These proposals were passed in the House of Representatives, but they received very limited congressional attention as Congress focused on other aspects of financial reform. These initiatives, if passed, would have had very significant impacts on the interests of the advertising industry. Through intense work and numerous meetings, ANA, along with industry partners, were able to block these expansive provisions from the final bill that was signed into law.

3. Behavioral Advertising: Representatives Rick Boucher (D-VA) and Cliff Stearns (R-FL) introduced a draft bill on privacy in May that could have had significant effects on behavioral advertising practices. A privacy bill was also introduced by Representative Bobby Rush (D-IL) in July. Senators John Kerry (D-MA) and Mark Pryor (D-AR) have hinted that they will introduce major privacy legislation in the Senate. The FTC released its long-awaited privacy report on December 1, 2010, which endorsed the implementation of a “Do-Not-Track” mechanism for online behavioral advertising. Congressman Ed Markey (D-MA) also stated that he would significantly broaden the scope of COPPA when it undergoes review. In addition, the Commerce Department released its own privacy report on December 16th. ANA, in conjunction with the 4A’s, the IAB, the DMA, and the CBBB, have developed a major new self-regulatory enforcement program for behavioral advertising based on seven key principles. This program was rolled out on October 4, 2010. ANA, along with our partner trade associations, are working to fully implement this program as soon as possible.
4. Food Advertising and Children: Representatives Dennis Kucinich (D-OH) and Jim Moran (D-VA) each introduced separate legislation in 2009 that would severely restrict advertisements of food to children. Reports issued by the Rudd Center for Food Policy and Obesity in 2009 and 2010 attacked Children’s Food and Beverage Advertising Initiative standards, which are the industry’s self-regulatory efforts in the food area, calling them ineffective and insufficient. The Interagency Working Group (IWG), comprised of the FTC, FDA, CDC, and the USDA, which had been tasked by the Congress to make recommendations in regard to food marketing, issued a set of draft guidelines for food marketing to children 17 and under in December 2009. A final report to Congress was set to be released in July 2010, but it has been delayed. The White House Task Force on Obesity issued a report in May 2010 calling for much stronger FCC regulation of food advertising during children’s television programming if self-regulatory standards are not improved.
5. Tobacco Advertising: In June 2009, President Obama signed a bill into law, which vastly extended the FDA’s authority over tobacco and tobacco advertising. ANA argued that the advertising provisions were some of the most sweeping and restrictive ever placed on a legal product in the United States. ANA, along with others in the advertising industry, filed an amicus (friend-of-the-court) brief detailing the broad First Amendment problems with the bill and its

implementation at both the Federal District Court and Federal Court of Appeals levels. The District Court threw out some of the advertising provisions as unconstitutional, but upheld other provisions, including promotional, sports, and cultural marketing restrictions. Whatever the outcome at the Court of Appeals level, the case is almost certain to be appealed to the U.S. Supreme Court.

6. FCC Initiatives: Under the Children's Television Act of 1990, commercial time during children's programming is limited to no more than 10.5 minutes per hour on weekdays and not more than 12 minutes per hour on weekends, and broadcast stations are required to air three hours of educational programming every week. In the fall of 2009, the FCC issued a Notice of Inquiry (NOI) and sought comment on whether current standards for advertising to children were effective. The ANA, along with other advertising associations, filed comments on this NOI in January 2010. FCC Chairman Julius Genachowski has expressed interest in restarting a rulemaking on interactive advertising to children, as well as evaluating the possibility of allowing parents to block advertisements to children.
7. Coalitions: ANA remains an active member of The Advertising Coalition (TAC), The Alliance for American Advertising (AAA), The Freedom to Advertise Coalition (FAC), and the State Advertising Coalition (SAC). In conjunction with The Advertising Coalition, we helped to defeat the sweeping FTC provisions that were included in the House version of the financial reform bill. The Advertising Coalition, of which ANA is a key member, also released an updated version of the Global Insight Study in late 2010. This study provides empirical evidence of the enormous economic value of advertising in every state and congressional district in the United States and will play a key role in supporting our lobbying efforts.

This is only a small sampling of the issues that ANA's DC office has been involved in this year. More information on these and other issues can be found in the pages that follow. As always, we post regular updates on these and any other issues on which we are currently working at <http://www.ana.net/advocacy>. The site also contains a comprehensive tracking system of legislative, regulatory, and legal issues facing our industry. If you have any questions, the DC office can be reached at 202-296-1883. Individual staff members can be reached as follows:

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The 112th Congress

Background

In the 2010 midterm election, the Democratic Party was dealt a significant blow. The Republicans earned a net gain of 63 seats in the House of Representatives and 6 seats in the Senate. The Republicans will hold the majority in the House for the 112th Congress, while the Democrats will retain a majority in the Senate. Republicans made a net gain of five governorships, while the governor's mansion of Rhode Island was won by an independent, former Senator Lincoln Chafee.

Many long-serving, powerful members of the House were defeated in their bids for re-election, including several with whom the advertising community had long relationships. Among those defeated were three House committee chairmen, thirteen House subcommittee chairmen, 22 members of the conservative Blue Dog Coalition, and 20 members of the moderate New Democrat Coalition. The new House is made up of 242 Republicans and 193 Democrats.

Some of the most notable House members defeated were:

- **Representative Jim Oberstar** (D-MN), Chairman of the Transportation and Infrastructure Committee
- **Representative John Spratt** (D-SC), Chairman of the Budget Committee
- **Representative Ike Skelton** (D-MO), Chairman of the Armed Services Committee
- **Representative Rick Boucher** (D-VA), Chairman of the Energy and Commerce Subcommittee on Communications , Technology and the Internet
- **Representative Earl Pomeroy** (D-ND), Chairman of the Ways and Means Subcommittee on Social Security
- **Representative Paul Kanjorski** (D-PA), Chairman of the Financial Services Subcommittee on Capital Markets, Insurance, and Government-Sponsored Enterprises
- **Representative Stephanie Herseth Sandlin** (D-SD), Blue Dog Coalition Co-Chairman for Administration
- **Representative Baron Hill** (D-IN), Blue Dog Coalition Co-Chairman for Policy

In the Senate, the Republicans made a net gain of six Senate seats. This gives the Senate 53 Democrats (including two independent Senators who caucus with the Democrats) and 47 Republicans.

Republican pickups in the Senate were as follows:

- **Arkansas:** Representative Jon Boozman defeated two term Democratic Senator Blanche Lincoln
- **Wisconsin:** Businessman Ron Johnson defeated three term Democratic Senator Russ Feingold

- **North Dakota:** Governor John Hoeven handily won the seat held by retiring Democratic Senator Byron Dorgan
- **Indiana:** Former Senator Dan Coats defeated Representative Brad Ellsworth to win the seat of retiring Democratic Senator Evan Bayh
- **Pennsylvania:** Former Congressman Pat Toomey was elected to the seat held by Democratic Senator Arlen Specter who was defeated in a primary in May
- **Illinois:** Congressman Mark Kirk was elected to the seat formerly held by President Barack Obama

Democrats held on to five closely contested seats:

- **California:** Senator Barbara Boxer was re-elected over Carly Fiorina
- **Colorado:** Senator Michael Bennet was re-elected over Ken Buck
- **Washington:** Senator Patty Murray was re-elected over Dino Rossi
- **Nevada:** Senate Majority Leader Harry Reid was re-elected over Sharron Angle
- **West Virginia:** Governor Joe Manchin was elected to the seat held by the late Senator Robert Byrd

The New Congress

New chairmen are in place for all House committees. Congressman Fred Upton (R-MI) is the new chairman of the Energy Commerce Committee, taking the gavel from Henry Waxman (D-CA). Representative Dave Camp (R-MI) is the new chairman of the Ways and Means Committee, replacing Congressman Sandy Levin (D-MI). Congressman Hal Rogers (R-KY) took the reins of the Appropriations Committee from retiring Chairman David Obey (D-WI). Congressman Spencer Bachus (R-AL), the ranking member of the Financial Services Committee in the 111th Congress, took the gavel of that committee from Representative Barney Frank (D-MA).

In the Senate, key chairmen with advertising concerns will retain their gavels. Senator Jay Rockefeller (D-WV), will continue as the chairman of the Commerce Committee. Tom Harkin (D-IA) will remain the chairman of the Health, Education, Labor, and Pensions (HELP) Committee. Max Baucus (D-MT) will continue to be the chairman of the Finance Committee.

The Republicans in the House have vowed to apply significant effort towards repealing major legislation passed under the 111th Congress, including Health Care Reform and the Wall Street Reform Bill. They have also promised extensive oversight of all government agencies and expenditures. This may lead to debates over the roles of regulatory agencies, as well as the powers they possess.

In total, there are 93 new members of the House of Representatives (84 Republicans, 9 Democrats). There are 13 new members of the Senate (12 Republicans, 1 Democrat). This influx of new members may present both challenges and possibilities. ANA will need to educate many new members of Congress on the economic benefits of

advertising, as well as the self-regulatory initiatives of the industry. However, the advertising industry may also have the chance to gain new allies in the process.

Advertising Tax Deductibility

Background

Advertising expenditures are 100% deductible as an ordinary and necessary business expense in the year in which they are expended under the Federal Income Tax code. In recent years, attempts have been made to deny the deductibility of advertising expenses, either across the board or for specific categories of advertising. Trillion-dollar deficits for the foreseeable future only increase the odds of continued consideration of an advertising tax at the federal level. As the need for additional revenue sources grow, members of Congress concerned about rising debt may turn to untapped sources of income to help close the budget deficit.

ANA has long argued that the advertising tax deduction provisions are vital for the nation's economic health. We recently sponsored, as part of The Advertising Coalition (TAC), an update of a 2004 study that examines the economic activity created by advertising in every state and Congressional district across the country. This landmark and unique study, based on an economic model formulated by the 1980 Nobel Memorial Laureate in Economics Lawrence Klein, has been vital in informing members of Congress of the economic benefit of advertising to their local economy. The updated study found that in 2010, businesses were spending at a rate of \$279 billion for the year on advertising. Every million dollars of this expenditure supports 69 American jobs. This spending on advertising, therefore, supports 19.8 million jobs in the United States, and accounts for \$5.8 trillion in economic output.

Congressional Activity

Prescription Drug Advertising

The debate over health care reform consumed Washington late in 2009 into the early part of 2010. Included in this debate was a discussion of the deduction for advertising of prescription drug products. In June 2009, the then-chairman of the House Ways and Means Committee, Representative Charlie Rangel (D-NY) claimed that ending the deduction for prescription drug ads would raise \$37 billion, which could then be used to fund health care reform. This figure was picked up in September by a member of the Senate Finance Committee, Senator Bill Nelson (D-FL) as that committee was considering the bill. Fortunately, neither of these proposals went further during the committee stage.

However, in October 2009, Senators Al Franken (D-MN), Sherrod Brown (D-OH) and Sheldon Whitehouse (D-RI) introduced legislation (S. 1763, "Protecting Americans From Drug Marketing Act") that would have disallowed the deduction for prescription drug advertising. In December, the Senators then threatened to bring up the bill as an amendment during debate over the health care bill on the Senate floor, but later decided not to go forward with this proposal. We wrote to the Senate urging it to reject a tax deduction elimination for the advertising of prescription drugs. Our letter to the Senate

can be viewed at <http://www.ana.net/advocacy/getfile/15432>. Soon after Senators Franken, Brown and Whitehouse had backed away from their effort, Senator Mark Begich (D-AK) threatened to bring up his legislation (S. 2842) that also would have denied the deductibility of expenses for prescription drug ads. Our letter to the Senate in response to Senator Begich's bill can be read at <http://www.ana.net/advocacy/getfile/15449>.

Companion legislation to S. 1763 was introduced in the House of Representatives as H.R. 3979 by Representative Marion Berry (D-AR). Additionally, Representative Jerrold Nadler (D-NY) introduced legislation (H.R. 2966) that would deny the deductibility of prescription drug advertising.

Food Advertising

Representative Dennis Kucinich (D-OH) introduced legislation in December 2009 that would have ended the tax deduction for any expenses for advertising and marketing directed to children "for purposes of promoting the consumption by children of food from any fast food restaurant or of any food of poor nutritional quality." His bill, H.R. 4310, was not considered by the House Ways and Means Committee, but at a July hearing with Secretary of Agriculture Tom Vilsack on childhood nutrition programs, Representative Kucinich argued for his bill and maintained that the potential funds that would be generated could help pay for child nutrition legislation. The bill had 25 cosponsors, including Representative John Conyers, then Chairman of the House Judiciary Committee, and a number of other members of the Congressional Black Caucus.

Image Advertising

Representative John Hall (D-NY) introduced a bill in January, H.R. 4518, which would have prohibited the tax deduction for advertising campaigns not related to a product or service by companies (including subsidiaries) with gross receipts over \$100 million a year. This would have undoubtedly affected public relations campaigns or other advertising campaigns not directly related to selling a product or a service by many large advertisers.

Outlook for 2011

With the recently completed update to the Global Insight study, ANA is armed with new ammunition in the fight to preserve advertising's full deductibility as a business expense. We will continue to demonstrate to members of Congress the economic benefit of advertising to their local economies and why taxing advertising would be misguided. Additionally, any attempt to single out a certain category of speech (where such speech is considered "controversial" for differential tax treatment would likely be found unconstitutional. All advertising expenses should be treated the same as any other ordinary and necessary business deduction under the tax code and be fully deductible.

State Advertising Tax Deductibility

Background

The states are under constant pressure to balance their budgets. Forty-nine states are required by their constitutions to balance their budget every fiscal year. Even in a normal environment, this puts pressure on states to find new ways to raise revenue. However, recently things have been anything but normal for the states. The Center on Budget and Policy Priorities, for example, estimates that 46 states collectively will face up to \$121 billion in deficits for fiscal year 2011. When states begin looking for new revenue sources, undoubtedly extending the sales tax to a number of products and services, including advertising that are presently exempted from this tax, may look far more attractive.

ANA has worked actively over the past 20 years to oppose attempts to tax advertising at the state level. We have helped defeat over 120 ad tax proposals in more than 40 states. We work with our member companies and our sister associations (the American Association of Advertising Agencies and the American Advertising Federation), as well as with local broadcasters and publishers, to respond to these threats. We are also members of The Advertising Coalition (TAC), 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.

State Ad Tax Proposals in 2010

In Pennsylvania, Governor Ed Rendell's original budget proposal included reducing the state sales and use tax from 6% to 4%, but expanding the base to impose the tax on virtually all services, including advertising and public relations. The Republican leadership in the state Senate fortunately declared that the Governor's sales tax plan was "dead on arrival." ANA urged our member companies with operations in Pennsylvania to urge the legislature to oppose the governor's plan, and the final budget included no tax increases on advertising.

New York also continued to consider bills to impose product-specific taxes on advertising. Assemblyman Felix Ortiz's bill, AB 2455, would impose an additional one-quarter of one percent tax on food and drink products and movie and video game rentals. Additionally, companies would be prohibited from deducting their New York share of expenditures for advertising food, video games and equipment, and movies and videos or DVDs on television shows primarily watched by children under 18. These funds would be used to fund anti-obesity campaigns. New York Assemblyman Richard Brodsky also had a bill, AB 5030, that would eliminate the deduction under state law for any direct-to-consumer prescription drug advertising.

Outlook for 2011

The states continue to operate under mounting fiscal pressures due to the struggling economic recovery. Many states have dipped into rainy day funds, used one-time accounting measures, federal stimulus funds, or significantly pared back state services and other spending, yet substantial deficits persist. This situation makes it more likely that states will have to resort to tax increases to balance future budgets. As tax increases enter the picture, the danger that states will turn to advertising as one of the sources of potential revenue substantially increases. We will continue to monitor this issue as the state legislatures return in January to ensure that advertising retains its full deductibility and is exempted from sales taxes at the state level.

Financial Reform and the Federal Trade Commission

Background

In response to the severe economic crisis of 2008-2009, Congress, with the urging of the Obama Administration, undertook efforts to reform the regulatory structure and policies that were claimed to have allowed for the many abuses that led to the severe economic downturn in the United States, including in the financial products and services industry. This effort, the largest undertaken to reorder regulation of the financial services industry since the Great Depression, played out throughout 2010, culminating in the passage of landmark legislation. Early proposals would also have dramatically changed the regulatory authority of the Federal Trade Commission (FTC), but were ultimately dropped from the bill.

Congressional Activity

In July 2009, Barney Frank (D-MA), Chairman of the House Financial Services Committee, introduced a bill to create a new agency, the Consumer Financial Protection Agency (CFPA). This bill would have given the new agency jurisdiction over the marketing of financial products and services, using a broad definition of “unfairness” as its rulemaking authority – much broader than the unfairness authority of the FTC. The bill also allowed the agency to restrict “abusive practices,” a broad and basically undefined term. In return for losing its jurisdiction over financial products and services, the bill would have given the FTC broad new powers over every remaining area in its jurisdiction. These new powers included the ability to conduct rapid rulemakings in as little as 180 days, without first identifying a pattern of false, deceptive or unfair activity. In addition, the FTC was not required to provide a “basis and purpose” for the rule which would have required it to first conduct an economic analysis. These proposals would have overturned the so-called “Magnuson-Moss” rulemaking procedures imposed on the FTC in the 1970’s that require “substantial evidence” to uphold a rulemaking. It also would have given the FTC expanded authority to immediately impose civil monetary penalties for any violation of the FTC Act without the involvement of the Department of Justice. Instead the FTC in justifying its rulemaking would have to demonstrate that it had not been “arbitrary and capricious,” a very low hurdle for the agency to overcome.

A new draft of the bill was released in September 2009, but the FTC provisions were unchanged. It was marked up by both the House Financial Services Committee and the House Energy and Commerce Committees in the fall (with little debate over the FTC portion of the bill), and it passed the full House in December as part of a broader Wall Street reform package (H.R. 4173).

The Senate began its consideration of the bill in early 2010, including consideration of the FTC provisions. The Senate Commerce, Science and Transportation Committee’s Subcommittee on Consumer Protection, Product Safety and Insurance began by holding hearings on the role of the FTC in February and March. ANA submitted testimony urging

the committee to reject the changes in the role of the FTC as unnecessary and counter productive. Our testimony can be viewed at <http://www.ana.net/advocacy/getfile/15623>. Meanwhile in April, the Senate Banking Committee Chairman, Senator Christopher Dodd (D-CT), introduced legislation (S. 3217) creating a Consumer Financial Protection Bureau (CFPB) housed at the Federal Reserve which would have jurisdiction over the advertising and marketing of financial products, but which did not include the provisions increasing the power of the FTC.

Senate floor consideration of S. 3217 began at the end of April. During floor consideration, Senator Jay Rockefeller (D-WV), the Chairman of the Senate Commerce Committee, introduced an amendment with the ranking member of the Committee, Kay Bailey Hutchison (R-TX) that restored the FTC's authority over financial services and products, giving it joint authority with the CFPB. Senator Rockefeller, in a floor statement, made it clear that the amendment provided no enhanced power to the FTC beyond its existing authority and that the CFPB and the FTC were directed to assure that there would not be dual simultaneous regulation between the FTC and the CFPB of a particular company's activity. The amendment passed on a voice vote and no further changes were made to expand the FTC's authority. The final bill passed the Senate 59-39 in May, and it headed to a House-Senate conference to be reconciled with H.R. 4173.

During this period, ANA, along with our fellow advertising trade associations and our member companies, was actively involved in meetings with members of the Senate and House, urging them not to include the FTC provisions in the House bill that dramatically expanded the FTC's authority in the final version of the legislation. We argued that the provisions were inserted into the House bill without being given adequate consideration, were too complex, and that they should be considered separately. We especially focused on the House-Senate conferees and the Blue Dog Democratic Caucus (the Blue Dogs are considered the more conservative wing of the Democratic Party) and the New Democratic Caucus in the House. Our letter to the Blue Dogs can be viewed at <http://www.ana.net/advocacy/getfile/15729>.

The conference took place in June. House Financial Service Committee Chairman Barney Frank chaired the conference. Despite repeated attempts by Chairman Frank and Representative Henry Waxman (D-CA), Chairman of the House Energy and Commerce Committee, to add the House's FTC provisions to the bill, the Senate conferees were able to reject these efforts. The bill, now known as the Dodd-Frank Wall Street Reform and Consumer Protection Act, passed the House on the last day of June and was approved by the Senate by a 60-39 vote on July 14. President Obama signed the bill in a signing ceremony at the Ronald Reagan Building in Washington on July 21.

Outlook for 2011

ANA and the entire ad community worked very hard in a concerted effort to keep the FTC provisions out of the bill. We met with over 100 Congressional offices to bring to light

the adverse effects the changes to the FTC's power would have on our industry. However, the advertising community still faces numerous challenges. The Dodd-Frank Act requires 243 rulemakings and 67 studies by 11 different agencies. It remains to be seen how the new CFPB, which has yet to take shape, will exert its authority over the marketing of financial products and services. However, it is clear that financial marketing and advertising will be placed under a regulatory microscope for some time to come.

Additionally, while the industry dodged a bullet with the expansion of the FTC's power being left out of the final bill, it is likely these issues will come up again as Congress considers a reauthorization of the FTC. In a meeting with Chairman Rockefeller during the final consideration of the Dodd-Frank Act, he strongly indicated that he will make every effort to push for changes in the Magnuson-Moss rulemaking procedures, and Chairman Waxman also continues to be a major proponent of these proposals. ANA will maintain our efforts to work with our member companies and industry partners to ensure that members of Congress carefully consider any changes to the FTC's authority.

Direct-to-Consumer Prescription Drug Advertising

Background

Since 1997, the FDA has allowed direct-to-consumer (DTC) prescription drug advertising. Despite numerous studies which show that such advertising is an important health resource for consumers, DTC advertising has been the target of many critics in Washington. Some critics claim that DTC advertising serves to drive up the costs of brand name prescriptions, while others claim that the ads do not provide adequate information about the drugs and their side effects. Over the past few years, many proposals have been put forward in order to severely restrict DTC advertising. Such proposals have included an end to the tax deductibility of DTC ads, requirements for greater disclosures of adverse effects of prescription drugs, and the prohibition of advertisements for new prescription drugs for extensive periods of time.

The Pharmaceutical Research and Manufacturers of America (PhRMA) has published self-regulatory guidelines for prescription drug ad placement, FDA voluntary preclearance, a balance between risk and benefit information, and other significant requirements. These guidelines, known as the Guiding Principles, are available at http://www.phrma.org/files/PhRMA_Guiding_Principles_Dec_08_FINAL.pdf.

The Health Care Debate and the Deductibility of Advertising Expenses

Like 2009, the first few months of 2010 were consumed with the debate over the Obama Administration's plan to overhaul the country's health care system.

A major topic of debate over health care reform was the question of how to fund it. The tax deductibility of DTC prescription drug ads was severely threatened several times. Representative Charlie Rangel (D-NY), who was at that time the Chairman of the House Ways and Means Committee, claimed that \$37 billion to fund health care reform could be raised by ending the tax deductibility of DTC prescription drug advertising. Rangel, facing strong opposition to this proposal generated by ANA and others in the advertising community, later abandoned these efforts in favor of other funding options.

During the Senate Finance Committee's mark-up of the health care bill in September 2009, committee member Senator Bill Nelson (D-FL) echoed the claim that \$37 billion could be raised by increasing the tax on DTC prescription drug ads. Senator Nelson stated that he would introduce an amendment during the Finance Committee's mark-up to effectuate this proposal, though he ultimately did not do so.

Also, in October 2009, the "Protecting Americans from Drug Marketing Act," (S.1763) was introduced and was co-sponsored by Senators Al Franken (D-MN), Sherrod Brown (D-OH), and Sheldon Whitehouse (D-RI). This bill sought to end the tax deductibility of DTC prescription drug advertising and promotional expenses. These senators stated their intention to add their bill to the health care legislation or to introduce it as an

amendment during the floor debate. ANA sent a letter to every member of the Senate explaining the far-reaching consequences that this bill could have on the tax deductibility of advertising for other products. That letter can be viewed at <http://www.ana.net/advocacy/getfile/15365>. These senators ultimately backed off from this legislative threat, and such a provision did not make it into the final health care reform bill.

FDA Proposed Rulemaking Amendments

In March, the FDA, in pursuance of a Congressional legislative mandate, promulgated a proposed rule to amend its regulations of DTC prescription drug advertisements. Specifically, the proposed rule would require that the statement about possible side effects of a drug be presented in a “clear, conspicuous, and neutral manner.” The proposed new rule can be viewed at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480aca825>.

The Advertising Coalition, of which ANA is a key member, filed comments on this proposed rulemaking on July 2, 2010. Those comments can be found at <http://www.ana.net/advocacy/getfile/15791>. In those comments, we argued that an advertisement was inherently “neutral” if it did not understate or overstate the possible side effects of a drug product or deter consumers from using beneficial pharmaceutical products. The comments also dealt with issues concerning “distraction” in DTC commercials, as well as various other topics. The comments were written by Arnie Friede, an expert on FDA legal requirements.

Moran ED Bill

In April of 2009, Representative Jim Moran (D-VA), reintroduced a bill that would ban ads for drugs that treat erectile dysfunction (ED) or advertisements for “male enhancement” drugs from being aired on broadcast radio or television between the hours of 6:00 am and 10:00 pm. This legislation, in addition, would give the FCC the power to classify these ads as “indecent.” The bill was referred to the House Energy and Commerce Committee in late April of 2009, and no further action was taken during the 111th Congress. ANA opposed this legislation on the grounds that it was unconstitutionally restrictive by blocking information directed to adults. The Supreme Court has consistently stated that a “child protection rationale” fails to trump the legitimate need for adults to receive information about legal products. The prescription drug industry, as part of the PhRMA Code, has agreed that these ads will only be placed in “programs or publications that are reasonably expected to draw an audience of approximately 90 percent adults (18 years or older).”

Outlook for 2011

ANA expects issues relating to DTC prescription drug advertising to remain active in the coming year. Congress will be under increasing pressure to find ways to pay for health

care reform and other programs. Proposals concerning DTC drug advertising may be pursued again. In addition, the FDA will likely continue to revise its rulemaking procedures about DTC prescription drug ads. ANA will continue its work, both independently and through The Advertising Coalition, to educate policymakers on Capitol Hill and in federal agencies about the benefits of DTC prescription drug advertising. We will discuss the value that these ads have to consumers' health and the steps that the industry is currently taking to make these ads even more effective and beneficial to consumers.

Behavioral Advertising

Background

Behavioral advertising, also known as behavioral targeting or interest-based advertising, provides marketers with an economically efficient method for reaching consumers. The process involves the collection of information about consumers' browsing habits, search queries, and content viewed on the Internet. Such information is then used to target individual consumers with advertisements based upon individual preferences. This type of information usually does not require the collection of or use of personally identifiable information, and the effective and efficient advertising that it produces helps to maintain free access to the vast array of information and services on the Internet to the mutual benefit of consumers and businesses. Nevertheless, behavioral advertising has weathered an increasing amount of criticism from its critics who claim that the public's privacy rights are being surreptitiously undermined.

FTC Principles

In November 2007, just before the FTC held a town hall on behavioral advertising, privacy groups proposed the implementation of a "Do-Not-Track" list that would be modeled on the "Do-Not-Call" list that is currently in force to regulate telephone direct solicitations. In December 2007, the FTC released draft suggested guidelines on behavioral advertising. That set of principles, which can be viewed at <http://www.ftc.gov/opa/2007/12/principles.shtm>, proposed guidelines for self-regulation of behavioral advertising. These principles called for advertisers to: provide adequate notice when data was being collected for advertising purposes, store collected data in a secure manner, keep collected data for a limited amount of time, and obtain an individual's opt-in consent before "sensitive" data could be used for behavioral advertising purposes.

ANA, along with a number of other trade associations, responded in detail to the proposed FTC guidelines. In those comments, ANA argued that the Commission's definition of behavioral advertising should carefully differentiate between personally identifiable, pseudonymous, and anonymous data collection procedures. Those comments can be found at <http://www.ana.net/advocacy/getfile/1364>. In February 2009, the FTC refined its online privacy principles in order to clarify many aspects of the original guidelines. That report can be accessed at <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>. At a hearing on consumer online privacy before the Senate Commerce Committee in July of this year, FTC Chairman Jon Leibowitz expressed his support of a "Do Not Track" mechanism, though he did not detail how such a mechanism would operate.

Self Regulatory Program for Behavioral Advertising

In July 2009, the ANA, in conjunction with the Direct Marketing Association (DMA), the American Association of Advertising Agencies (the 4 A's), the Council of Better Business Bureaus (BBB), and the Interactive Advertising Bureau (IAB), announced and endorsed a "Self-Regulatory Program for Online Behavioral Advertising." This program centers around seven key principles: education, transparency, consumer control, data security, material changes, sensitive data, and accountability. These principles provided the foundation for self-regulatory guidelines for the use of consumer information in behavioral advertising. The document is available at <http://www.ana.net/advocacy/getfile/15279>.

The implementation proposals for this program were released on October 4, 2010. They can be accessed at http://www.aboutads.info/resource/download/OBA_Self-Reg_Implementation_Guide_-_Full_Text.pdf. ANA, along with its partner trade associations held a series of webinars in the fall of 2010, which provided information about the program and its implementation.

Despite its innovative approach, the program has endured criticism from privacy advocates and government officials. David Vladeck of the FTC's Bureau of Consumer Protection has said that industry self-regulatory initiatives, such as this program, do not go far enough. Privacy advocates have called the program inadequate and have continued the push for a legislative approach to regulation.

Congressional Activity

Congressional activity on the subject of behavioral advertising heated up significantly this year. These initiatives included a detailed privacy draft bill put forward by Representatives Rick Boucher (D-VA) and Cliff Stearns (R-FL). In addition, H.R. 5777, the BEST PRACTICES Act, was introduced by Representative Bobby Rush (D-IL), the Chairman of the House Energy and Commerce Committee's Subcommittee on Commerce, Trade, and Consumer Protection. This legislation would have significant implications for behavioral advertising practices. Both bills would require privacy notices and opt-out consent in order to collect data for first party use in behavioral advertising. Congressman Boucher's bill would require opt-in consent for all collection of data for third party use. Representative Rush's bill provides much broader safe harbor provisions, which would exempt companies from many of the bill's requirements if they participate in an FTC-approved self-regulatory system. Congressman Rush's bill, unlike Congressman Boucher's draft bill, allows for a private right of action by consumers. The scope of both bills is unprecedentedly broad, extending to data collection in the offline world as well. ANA filed comments on Congressman Boucher's draft bill in June. The comments are available at <http://www.ana.net/advocacy/getfile/15751>.

This issue also began to heat up in the Senate this year. On July 27, Chairman Jay Rockefeller (D-WV) of the Senate Committee on Commerce, Science, and Transportation

convened a hearing on consumer online privacy. At the hearing, Senators from both sides of the aisle lashed out at the advertising industry for their alleged inappropriate use of behavioral advertising. Chairman Rockefeller compared the practice of behavioral advertising to being followed around a shopping mall by a camera-wielding stalker. Comments from other senators on the practice ranged from “invasion of privacy” to “creepy” to “the catalog industry on steroids.” FTC Chairman Jon Leibowitz testified at the hearing and expressed interest in implementing a “Do Not Track” mechanism that would allow consumers to exempt themselves from behavioral advertising in a manner similar to the Do-Not-Call list for telemarketers. At the hearing, Senator John Kerry (D-MA), who is the Chairman of the Subcommittee on Communications, Technology, and the Internet, said that he and Senator Mark Pryor (D-AR), the Chairman of the Subcommittee on Consumer Protection, Product Safety, and Insurance, plan to introduce legislation in the relatively near future to regulate behavioral advertising.

The issue also heated up in the lame duck session of the 111th Congress. On December 2, 2010, one day after the release of the FTC’s privacy report, the Commerce, Trade, and Consumer Protection Subcommittee of the House Energy and Commerce Committee held a hearing on Do-Not-Track legislation. There were witnesses from advocacy groups, the government, and the industry.

Among the witnesses were David Vladeck, the Director of the FTC’s Bureau of Consumer Protection and Daniel Weitzner of the National Telecommunications and Information Administration at the Department of Commerce. Vladeck expressed support for a Do-Not-Track regime, and he said such a system was technologically feasible. He also recognized industry self regulation, but said that it was not sufficient and was being implemented too slowly. Weitzner expressed support of self regulation, but also said that it should be stronger and should be implemented more quickly. He stated that the Commerce Department’s privacy report would be released within a few weeks.

Witnesses from the industry expressed the sentiments that Do Not Track would be tough to implement and that it may do little more than lead to more advertisements that would have less relevance to users. Advocacy groups attacked current self regulatory programs and compared behavioral advertising to information collection by spy intelligence agencies. Members of the subcommittee asked about the technological feasibility of establishing a Do Not Track system, the means for implementing such a system, and the possible effects of Do Not Track on advertising revenue.

FTC Privacy Report

On December 1, 2010, the Federal Trade Commission released its long-awaited privacy report, “Protecting Consumer Privacy in an Era of Rapid Change.” This report, which can be accessed at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>, is far-ranging in its implications for the online advertising industry. Most importantly, it recommends the implementation of a “Do Not Track” regime based on the already-existent Do-Not-Call Registry, which would block advertising companies from tracking users’ browsing in order

to provide them with targeted ads. It also criticized industry self-regulation efforts and the speed at which they have been implemented.

ANA has been critical of the Do Not Track proposal. We argue that such a proposal would be detrimental to the interests of advertisers and consumers. We also point out that “Do Not Track” is a misnomer which provides a false sense of security, as users would actually receive more advertisements that would not be tailored to their interests. ANA published a blog on this topic that can be accessed at <http://www.ana.net/blogs/show/id/20772>. Comments on the privacy report are due to the FTC on January 31, 2011. ANA will be filing comments on the report.

Due to the vast amount of recommendations and questions in the report, ANA, along with seventeen other trade associations, has asked for an extension of the deadline for submission of comments. That letter is available at <http://www.ana.net/getfile/16052>. We will need a significant amount of time to properly analyze the recommendations and to gather the appropriate data for sufficient comments from our broad membership. We are hopeful that an extension will be granted.

Department of Commerce Internet Policy Task Force and Privacy Green Paper

In April, the Department of Commerce’s Internet Policy Task Force submitted a Notice of Inquiry (NOI), soliciting comments “on the impact of current privacy laws in the United States and around the world on the pace of innovation in the information economy.” The NOI can be viewed at http://www.ntia.doc.gov/frnotices/2010/FR_PrivacyNOI_04232010.pdf.

In June, ANA filed comments, along with the DMA, IAB, and the 4A’s. Our comments are available at <http://www.ana.net/advocacy/getfile/15767>. Those comments detailed the benefits of behavioral advertising, including fostering low-cost products and services to consumers and increasing economic competition. We urged the Department to avoid regulatory approaches that might stifle these and other benefits to consumers, and we discussed the development and progress of our self-regulatory program on behavioral advertising.

The Department of Commerce released its privacy report, “Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework” on December 16, 2010. The report, available at <http://www.commerce.gov/sites/default/files/documents/2010/december/iptf-privacy-green-paper.pdf> called for a “privacy bill of rights.” The Commerce Department expressed support for “voluntary, enforceable codes of conduct” that would be based on “fair information practice principles.” Support for stronger self-regulatory efforts appeared in the report, as well as support for a so-called “privacy czar” within the Administration. Comments are due to the Commerce Department on January 28, 2011. ANA will be filing comments with the Commerce Department. As with the FTC Privacy Report, ANA and seventeen other trade associations have asked for an

extension of the deadline for submission of comments. That letter is available at <http://www.ana.net/getfile/16051>.

Outlook for 2011

The debate over behavioral advertising will likely continue to be a serious issue throughout 2011. The picture painted of the practice by members of Congress, privacy groups, and the recent wide-ranging *Wall Street Journal* series of articles on behavioral advertising, which can be accessed at <http://online.wsj.com/public/page/what-they-know-digital-privacy.html>, will likely keep the issue fresh in the minds of the public and policymakers. In addition, a willingness to regulate these practices seems to be prevalent on both sides of the aisle. ANA will continue to press forward in helping to promote and strengthen our self regulatory program. We believe that self-regulation in this rapidly developing area is a better solution than legislation, as self-regulation can work in a flexible, yet effective and enforceable manner, while legislation must respond to challenges at a specific moment in time and may create rigid practices that will fail to deal with dynamic challenges in the marketplace. We will file comments with regulatory agencies on their proposed new regulations of behavioral advertising, and we will work to ensure that a balance between consumer privacy and effective advertisements is found.

Food Advertising and Obesity

Background

In recent years, the food, beverage, and restaurant industries have endured increasing criticism, due to accelerating obesity rates among children. The Obama Administration has demonstrated major interest in curtailing rates of childhood obesity through the creation of the White House Task Force on Childhood Obesity based around the First Lady's "Let's Move" campaign. More information on the First Lady's campaign can be found at <http://www.letsmove.gov>.

In May, the Task Force published a report titled "Solving the Problem of Childhood Obesity Within a Generation." There have also been efforts in Congress, as well as in state legislatures, to curtail food advertising in the name of lowering obesity rates. ANA has worked closely with the food, beverage, and restaurant industries to assist efforts to curtail childhood obesity rates by altering marketing practices and substantially strengthening self regulatory initiatives. ANA, along with others in the advertising industry, helped foster the launch of the Children's Food and Beverage Advertising Initiative (CFBAI), which is a voluntary self-regulatory program that works to promote good nutrition and healthy lifestyles for advertising directed to children under the age of 12.

Congressional Activity

In November 2009, Representatives Jim Moran (D-VA) and Bill Pascrell (D-NJ) introduced H.R. 4053, known as the Healthy Kids Act. It called for the FCC to strongly restrict many types of food and beverage advertisements that appear during children's programming. The bill divided food products into three tiers. Tier 1 foods and beverages would be those "which are healthful for children and adolescents and the consumption of which is encouraged." Tier 2 foods and beverages would be those that "do not exceed levels of total, saturated, and trans fat, sugars, and sodium that are in a healthful diet for children and adolescents." Finally, Tier 3 foods and beverages would be described as those "which do not contribute to a healthful diet for children and adolescents and the consumption of which is discouraged." The bill mandates the creation of guidelines for advertising covering each category of food to children, and it calls for such guidelines to take children's emotional vulnerability and cognitive abilities into consideration. Advertisements for so-called Tier 2 foods and beverages during children's programming would be limited to two minutes per hour on weekends and three minutes per hour on weekdays. Advertisements for foods and beverages classified as Tier 3 would be completely prohibited during children's programming. In January 2010, the bill was referred to the Subcommittee on Healthy Families and Communities of the House Education and Labor Committee.

In December 2009, Rep. Dennis Kucinich (D-OH) introduced H.R. 4310. This bill would end the tax deductibility of any advertising to children for "fast food" or food of

“poor nutritional quality.” The definition of such foods, laid out by this bill, would be any food determined by the Treasury Department and the Department of Health and Human Services to be one which “provides calories primarily through fats or added sugars” and “has minimal amounts of vitamins and minerals.” There were 25 co-sponsors of this bill, including Representative John Conyers (D-MI), the Chairman of the House Judiciary Committee, in the 111th Congress.

Federal Interagency Working Group

In March 2009, Congress passed an omnibus appropriations bill which called for the creation of an Inter-Agency Working Group (IWG), consisting of four government agencies, to study the possible need for standards to be established for the marketing of food and beverages to children under 17. The four agencies included in the working group are the FTC, the FDA, the CDC, and the USDA. In December 2009, the IWG published draft guidelines which can be found at <http://www.ana.net/advocacy/getfile/15441>. ANA’s response to these guidelines can be found at <http://ana.blogs.com/jaffe/2009/12/ftc-forum-today-on-food-marketing-and-childhood-obesity.html>.

The guidelines were originally set to be released early in 2010 for comment, and a final report to Congress was supposed to be submitted by July. The guidelines and report, however, have been delayed. According to press reports, this is due to the fact that the agencies have had trouble agreeing on a standard. As of this writing, the final report has not yet been released.

FTC Activity

In 2008, the FTC issued a report titled “Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation.” The report, which is available at <http://www.ftc.gov/opa/2008/07/foodmkting.shtm>, called for the food industry “to adopt and adhere to meaningful, nutrition-based standards for marketing their products to children under 12.” Information in the report was collected from 44 food companies.

In August, in an effort to amplify the 2008 report, the FTC subpoenaed 48 food companies to provide documents for the follow up report. Carol Jennings, a spokesperson for the FTC, was recently quoted as saying that the new subpoenas were part of an effort to test the effectiveness of self-regulation. She was also quoted as saying that she did not expect new FTC rulemakings as a result of the newly subpoenaed information.

State Activity

New York State Assemblyman Félix Ortiz, the Chairman of the New York Assembly Committee on Mental Health, has repeatedly introduced legislation which would impose

additional taxes on sweets and snack foods. This legislation would also place extra taxes on the sales and rentals of video games, computer games, CDs, DVDs, and video cassettes. Television advertisements for any of these products that air in New York during programs determined to have audiences composed primarily of children would also be subjected to taxation. These taxes would be used to create a program aimed at reducing obesity in children.

Studies on Food Advertising

Creating a heated political environment, a growing number of studies have been published on allegedly significant effects of food advertising on obesity rates in the United States. The Rudd Center for Food Policy and Obesity at Yale, for example, released a study in October 2009 that examined the marketing of cereals to children. Professor Kelly Brownell, the Director of the Rudd Center, and his co-authors argue that the self-regulation efforts of the food industry through the CFBAI are a failure. They acknowledge that many CFBAI member companies are in compliance with its self-regulatory requirements, but they claim that such compliance is meaningless due to the fact that many of the “least nutritious” cereals are still being marketed to children. The authors allege that marketing messages about these cereals were misleading and deceptive, and they propose that the government should implement tougher limits on the amounts of sugars in foods that could be advertised to children. This study can be viewed at http://www.cerealfacts.org/media/Cereal_FACTS_Report.pdf. The study ignores, among other things, however, the fact that many of CFBAI’s member companies meet the HHS/USDA standards for healthy foods. The Rudd Center released another report in February 2010, which also looks at food advertising to children on television. Much like the Rudd Report of October 2009, this study argues that although companies are in compliance with the self-regulatory program prescribed by CFBAI, the number of food ads seen on television by children has largely remained static. However, a study carried out by the ANA, in conjunction with the Grocery Manufacturers Association (GMA), demonstrated that food advertising directed to children has substantially decreased in the last several years. A study carried out by the FTC staff also confirmed these results. These studies are available at <http://www.ana.net/advocacy/getfile/14761> and <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>, respectively.

The Center for Science in the Public Interest (CSPI) has also published several reports in recent years which criticize food advertising and claim that these ads have a direct link to childhood obesity. In the fall of 2009, the CSPI published “Better for Who? Revisiting Company Promises on Food Advertising.” This study criticized the CFBAI self-regulatory program, saying that more than 70 percent of CFBAI member companies were still advertising food of poor nutritional quality to children. That document can be viewed at <http://cspinet.org/new/pdf/pledgereport.pdf>.

In November 2008, a study authored by Dr. Ezekiel Emanuel (the brother of Rahm Emanuel, who was at that time the President’s Chief of Staff) and others, reported a link between food advertising and obesity rates. The study called for limits on advertising of

“junk food” in order to cut down on obesity rates. This study is available at http://www.common sense media.org/sites/default/files/CSM_media+health v2c110708.pdf.

In February 2009, the National Bureau of Economic Research published a study which claimed that children and pregnant women had higher rates of obesity when they went to school or lived within 0.1 to 0.5 of a mile from fast-food restaurants. The authors argue that the government should take steps to limit fast food advertising and access to fast food near schools in order to lower obesity levels or impose restrictions on the advertising tax deductions for such advertisements. This report is available at <http://www.econ.berkeley.edu/~sdellavi/wp/fastfoodJan09.pdf>.

In October 2010, a report was published by Professor Howard Beales of the George Washington University School of Business, which reviewed studies on the relationship between food advertisements on television and obesity that have been published since the 2006 IOM review of the existing research. Beales’ report found that the new studies still suggest that any link between television food advertising and obesity in children ages 12-18 is very weak. This report also suggests that the new research still does not conclusively rule out other causes of the link between television viewership and obesity. The report claims that studies which use direct measurements of advertising often use data that is not sufficient. Overall, Beales concludes that studies published since 2006 still do not show a causal link between television food advertising and obesity. This report is available at http://www.gmaonline.org/file-manager/Health_Nutrition/Beales-Review-of-Recent-Studies.pdf.

A number of other studies also strongly promote the connection between food advertising and obesity rates. Many of the more recent studies admit that there is no conclusive causal link between food advertising and obesity, yet many of them still press for a stringent increase in the regulation of food advertising. Nevertheless, the most comprehensive and definitive review of food advertising carried out by the Institute of Medicine (IOM), though it called for more governmental attention to food advertising to children, concluded that there was not a causal link that could be demonstrated between food advertising and obesity. That report is available at <http://www.iom.edu/Reports/2005/Food-Marketing-to-Children-and-Youth-Threat-or-Opportunity.aspx>.

White House Task Force on Obesity

The White House Task Force on Obesity released its report, “Solving the Problem of Childhood Obesity Within a Generation,” in May. The report can be viewed at http://www.letsmove.gov/pdf/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf. It calls for the strengthening of self-regulatory standards by the industry on advertising food to children. If self-regulatory standards are not improved, the report recommends that the FCC should impose stronger regulations on food advertising during children’s television programming, including the potential rating of food advertisements so that

they can be blocked by parents in the same way that broadcast programming is presently rated.

Children's Food and Beverage Advertising Initiative (CFBAI)

In November 2006, the Council of Better Business Bureaus (BBB) launched the Children's Food and Beverage Advertising Initiative (CFBAI). Under the original initiative, companies who participated in the program had to target at least 50 percent of all of their food and beverage advertising directed toward children under the age of 12 to foods and beverages that were healthier or "better for you." In order to qualify as healthier or "better for you," the foods were required to meet established scientific and government standards, such as those set by the USDA. Participants also agreed to reduce the use of third-party licensed characters in promoting foods and to not utilize product placement of foods and beverages in programs directed to children under 12. Finally, the participating companies agreed not to advertise foods and beverages in elementary schools.

As of January 2010, participants are required to target 100 percent of their food and beverage advertisements to children under 12 to foods and beverages that promote healthier lifestyles. In addition, CFBAI expanded the initiative to include marketing in video games directed to children, as well as cell phone and word-of-mouth advertising that targets children.

Seventeen companies currently participate in CFBAI. Those seventeen companies carry out almost 80 percent of all food and beverage advertising that is directed to children ages 12 and under. These companies have now agreed to make 100 percent of their advertising directed to children meet these standards. More information about this effective self-regulatory program is available at <http://www.bbb.org/children-food-beverage-advertising-initiative>.

Outlook for 2011

We expect this issue to remain highly active in the coming year. Senator Tom Harkin (D-IA), the Chairman of the Senate Health, Education, Labor, and Pensions Committee (HELP) has long focused on food advertising issues as a means to curb childhood obesity. With the First Lady actively declaring this a primary issue, we expect that discussions will remain focused on this topic. The Interagency Working Group's forthcoming publication of its guidelines and report to Congress will need to be carefully evaluated. A review of the food advertising practices of 48 companies that is presently being carried out by the FTC will also keep a spotlight on this issue. ANA will continue to work on strengthening self-regulatory programs such as CFBAI. We will continue to monitor congressional activity on food advertising and will remain vigilant in regard to any attempts to restrict or ban the advertising of foods and beverages.

FCC, Children and Media

Background

Congress placed limits on advertising content that can be aired during children's programming on television (both on broadcast and cable) under the Children's Television Act of 1990 (CTA). Commercial time is limited to no more than 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. Additionally, broadcast stations must air 3 hours of educational children's programming per week. Children interact with many more forms of media than they did when the CTA was first conceived, so recently the FCC, which is tasked with enforcing the Act, has debated whether to extend its requirements to other forms of media. As concerns about the content of the commercials themselves has grown, some have urged that the FCC should begin regulating content of commercials as well, or to allow parents to block ads altogether.

FCC Activity

Children's NOI

In October 2009, the FCC issued a Notice of Inquiry (NOI) entitled "Empowering Parents and Protecting Children in an Evolving Media Landscape (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-94A1.pdf). It asked for comment on a broad range of issues relating to advertising and children in the digital age. The questions for comment included:

- The harms that may arise from advertising directed specifically to children and the risks of exposure to ads promoting "unhealthy foods" or containing "inappropriate content"
- The impact advertising in the digital media has on children – including interactive advertising, advergames, and embedded advertising
- The effectiveness of the CTA limits on commercial matter during children's programming and whether they should be extended to other platforms
- Whether voluntary efforts such as the Children's Food and Beverage Advertising Initiative (CFBAI) have proven effective
- Whether current parental control tools are effective and whether it would be feasible to use them to block ads (and the economic effects of such a step)

Comments were due by the end of January 2010. Because of the breadth and depth of questions posed by the NOI, ANA and the 4A's, AAF, DMA, IAB and PMA asked for an extension. Our extension letter can be viewed at <http://www.ana.net/advocacy/getfile/15486>. The FCC agreed and extended the deadline by one month. We also decided to file reply comments in anticipation that critics of marketing to children would come up with a "wish list" of ads and content in various media that they would like to see blocked or eliminated. Our 90-page reply comments, filed in March, urge the FCC to tread carefully in this area. We note that industry is responding through self-regulation and the creation of ratings and filtering options

parents can use to shield children from certain types of content. We urged the FCC to take the economic underpinnings of media, the impact of media on children, and the constitutional limits of its authority into account before making policy changes in this area. These comments can be viewed at <http://www.ana.net/advocacy/getfile/15664>.

Interactivity and Children's Television

Apart from the Children's NOI, FCC Chairman Julius Genachowski has repeatedly stated that he wants to restart the FCC's stalled rulemaking on interactive advertising during children's programming. The rulemaking, which stalled in 2004, tentatively concluded that interactive advertising to children and in particular connections from broadcasting to the internet in children's programming and advertising should be severely limited.

Broadband Plan for Children and Families

In a speech on the FCC's broadband plan in March at the National Museum of American History, FCC Chairman Genachowski said that children need to be taught to "evaluate media content and recognize advertising for what it is." Later on in his speech, he twice raised a question regarding the number of healthy food ads aired during children's programming and then answered with statistics from a report by Professor Dale Kunkel of the University of Arizona that purports to find that "a child has to watch ten hours of children's television programs to find one truly healthy food ad. In that same time period, he or she would have seen 75 other foods ads, 55 for unhealthy foods." These statistics unfortunately are highly problematic and in our view, inaccurate.

The Chairman also mentioned the reevaluation of the CTA and the status of ratings and blocking technologies, both of which are part of the ongoing Children's NOI.

Outlook for 2011

As indicated by the Chairman of the FCC, children's issues will continue to be a priority for the Commission. Whether the information received by the FCC in response to the NOI prompts it to undertake a rulemaking remains to be seen. We will participate in any future attempts by the FCC to limit ad content or to block ads entirely. We believe that self-regulation is effective and is the only way that these types of ads can be limited without running afoul of the Constitution.

FCC Commercial Ratings and Blocking Review

Background

The Telecommunications Act of 1996 required television manufacturers to insert “v-chips” in any television set 13 inches or larger sold after the year 2000. These v-chips allow parents to block children from viewing television programs with certain ratings, in order to prevent children from seeing programming which their parents find objectionable. At present, the ratings system only covers programming. In recent years, however, increasing concern has been raised about commercial content.

FCC Notice of Inquiry

In March 2009, the FCC issued a Notice of Inquiry (NOI) in regard to a report that it was required to submit to Congress by August 2009. That report, which was required under the Child Safe Viewing Act of 2007, was intended to detail the availability of content blocking technologies available to parents on different communications platforms. The FCC solicited comments on whether or not the television rating system should be altered to include commercials, which are not currently covered by ratings guidelines. The FCC and advocacy groups had expressed interest in including commercials in the ratings system, due to violent, sexual, or other controversial content in some commercials. If the FCC were to include commercials under the ratings system, this policy alteration would make it possible to block them via v-chips or other blocking technologies.

ANA submitted comments along with a number of other groups, written by First Amendment attorney Robert Corn-Revere, to the FCC in April 2009. They can be viewed at <http://www.ana.net/advocacy/getfile/15125>. In our comments, we argued that commercial ratings would seriously damage the value of broadcast media, which is largely supported by advertising revenue. ANA stated that allowing consumers to block ads while still receiving the content that those ads paid for would greatly damage the value of television advertising and programming. We pointed out that almost two thirds of television households do not include children, so that such a proposal would be overly extensive. We also noted that an ad rating system would amount to regulatory overkill, as very few ads cause great controversy. We pointed out that, due to the large volume of television advertisements, such a system would lead to an administrative nightmare. ANA finally questioned the constitutionality of such a system.

Several advocacy groups simultaneously filed comments that contained a “wish list” of types of commercials they would like to block. These included, among other things, advertisements for violent video games, violent movies, certain food ads, ads for alcoholic beverages, and programs with product placements. ANA, along with the American Association of Advertising Agencies (4A’s) and American Advertising Federation (AAF), filed reply comments in May 2009, which argued that the poor economic situation being faced by the media industry would only be made far worse by a rating system like the one proposed, as such a system would seriously undermine

television advertising. Those comments can be found at <http://www.ana.net/advocacy/getfile/15197>.

A final report was issued by the FCC in August 2009, which said that the Commission was not satisfied with the record established in the initial inquiry and that they would pursue the issue further. That report can be accessed at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-69A1.pdf.

White House Task Force on Obesity

The White House Task Force on Obesity released its report, “Solving the Problem of Childhood Obesity Within a Generation,” in May of this year. It pushed for self-regulation of food advertising to children. The report suggests, however, that if self-regulatory programs do not work, the FCC should pursue revisions to television commercials directed to children. Such revisions, the report suggested, might include the rating of television commercials.

Outlook for 2011

ANA is a long-time supporter of self-regulatory programs and private sector initiatives, which allow parents the ability to control television programming that is viewed in their homes. ANA remains opposed, however, to attempts to rate or block commercials based upon their content. We believe that such an action would be disastrous for television programming that is supported by advertising. ANA will continue to monitor the FCC’s actions and will strongly respond to any Notice of Inquiry that it may publish in this area.

Green Marketing

Background

With the substantially increased concerns about climate change and other significant environmental issues in recent years, “green marketing” has received far more attention from consumers, regulators, and the media. “Green marketing” refers to the advertising of products which are supposed to either improve or be less harmful to the environment than traditional products. Green marketing advertisements tend to focus on methods of production, packaging methods, and the makeup of products. The increase in green marketing has prompted regulatory agencies to examine so-called “greenwashing,” where marketers are accused of making inaccurate or insufficiently supported claims about the environmental benefits of products. The FTC recently released proposed updates to the “Green Guides,” which could potentially have far-reaching consequences for advertisers.

FTC Green Marketing Guidelines

In 1992, the FTC published “Environmental Marketing Guides,” which were supposed to help prevent deceptive or misleading green marketing by companies. These guides are not laws or regulations, but they provide marketers with important insight on how the FTC will evaluate the acceptability of the use of green marketing terms such as biodegradable, compostable, recyclable, recycled content, and ozone safe. The FTC updated the guides in 1996 and again in 1998. The updates were designed to provide marketers with additional guidance about how to substantiate adequately any claims about their products’ impacts on the environment. The updated guidelines also provide advice on third party endorsements of products which were advertised as “green.” The 1998 Environmental Marketing Guides can be viewed at <http://www.ftc.gov/bcp/grnrule/guide980427.htm>.

FTC Workshop

Due to a rapid increase in green marketing claims, the FTC held several public workshops in 2008 in order to study green marketing claims and began reviewing its green marketing guidelines. These workshops were designed to evaluate the effectiveness of current green marketing guidelines and determine if changes to current guidelines were needed.

As a result of being unsatisfied with the information gathered at the workshops, the FTC decided to pursue its own research on consumer perception of green marketing terms such as “eco-friendly,” “sustainable,” and “carbon neutral.” New proposed guidelines were released in October 2010.

2010 Updates to the Green Guides

On October 6, 2010, the FTC released proposed updates to green marketing guidelines. The proposed revisions, which can be accessed at <http://www.ftc.gov/opa/2010/10/greenguide.shtm>, address certain claims already covered by the existing guides. For example, on the subject of general environmental benefit claims, marketers are advised under these revisions not to make such claims because they are hard to substantiate. Certifications and Seals of Approval, under these proposed revisions, will be classified as endorsements under the FTC's Endorsement Guides. On "degradable" products, the proposed revisions state that a "reasonably short period of time" for total decomposition of a product shall be defined as a period of one year or less. The definition of "compostable" is clarified, and definitions of the availability of recycling are spelled out in more detail. The new guidelines also clarify "free of substance" claims, as well as "non-toxic" claims.

Several new terms have been added to the proposed revisions. In a "Made With Renewable Materials" claim, a marketer is expected to provide specific information about what the renewable material is, why it is renewable, and whether or not any non-renewable materials may be included in the product. Claims of "Made With Renewable Energy" should be used only for products which did not involve the use of fossil fuels for power used in manufacturing. Marketers are also advised to specify the sources of renewable energy used. If marketers produce renewable energy but sell renewable energy certificates for the energy they produce, they are advised not to claim that they use renewable energy. Marketers who claim "carbon offsets" in their manufacturing processes are supposed to have reliable scientific evidence of such claims, and they are not supposed to advertise carbon offset efforts if the efforts are ones which are required by law.

ANA filed comments on the Green Guide updates on December 10, 2010. Those comments are available at <http://www.ana.net/getfile/16033>. We expressed concern in our comments about the FTC's proposed guidance on the substantiation of claims concerning general environmental benefits. We also noted concerns we have with the guides' certification and seal programs approach. ANA also asked the FTC to reevaluate its guidance on terms such as compostable, degradable, and renewable material. Our comments were drafted by John Feldman of the Reed Smith law firm. We received input from a number of our member companies before submitting our comments.

Outlook for 2011

These new guidelines are more stringent and wide-ranging than previous ones. In light of rumblings about bills concerning energy, climate change, and the environment, it is reasonable to expect that the focus on environmental marketing will continue to be a major factor, both legislatively and at the regulatory agency level. ANA played an important role in the development of the FTC's Green Guides in the past. ANA will need to continue to remain vigilant concerning the new modifications to the guidelines and

will work to ensure that appropriate guidance is put forward to assist advertisers, while also being watchful to assure that First Amendment commercial speech rights are not infringed upon by the new guidelines.

Maine Online Marketing Bill

Background

In 2009, the Maine Legislature passed legislation (LD 1183) that prohibited marketers from knowingly collecting, receiving or using personal or health-related information from children without obtaining verifiable parental consent. Personal information was defined to include an individual's name, physical address, or anything else that could be used to individually identify a person. Even with parental consent, LD 1183 prohibited the use of personal or health-related information regarding a minor to market products or services to them. The law described these practices as "predatory marketing." It also allowed for a private right of action for consumers and recovery of actual damages for each violation, with civil fines over \$20,000 for repeat offenses.

Many of our member companies that conduct business in Maine were alarmed at the sweeping scope of the law. Minors would no longer be able to receive information about a wide variety of products and services, including educational institutions and testing services. We immediately sought to inform lawmakers about the serious issues raised by the law, which included both First Amendment and dormant commerce clause concerns. We also supported a suit by a broad coalition of industry groups for a preliminary injunction against enforcement of the law. Before the suit was decided, the Maine Attorney General's office stepped in, and noting the serious First Amendment issues involved, stated it would not carry out any prosecutions under the law. The court, while not granting the injunction, noted the agreement in its order and held that any private suit filed, which were provided for under this new law, would face the same constitutional issues.

Status

The Maine Legislature reacted by trying to work around the constitutional issues inherent in the law. In January, new legislation (LD 1677; <http://www.mainelegislature.org/LawMakerWeb/summary.asp?ID=280035235>) was introduced that prohibited the collection of personal information from minors (defined as up to 17 years old) for the use of pharmaceutical marketing. It would have created a new unfair trade practice called "unlawful pharmaceutical marketing to minors" and directed the state attorney general to adopt rules governing this area. The bill also would have repealed LD 1183.

At a hearing of the legislature's Business, Research and Economic Development (BRED) Committee, we submitted a letter urging the legislature to simply repeal LD 1183. That letter can be viewed at <http://www.ana.net/advocacy/getfile/15561>. After an attempt by the sponsor of the bill to limit it to prescription drug products while expanding it to cover all media and not just the internet, the BRED Committee voted for a "clean" repeal of the law.

Governor John Baldacci (D) signed the legislation repealing LD 1183 into law on March 29. The new law had an emergency clause, so the repeal took effect immediately.

Product Placement

Product placement is a popular form of advertising in which a branded product or service is presented in a television program, movie, or video game. It can add realism to fiction or reality programs, and it may help launch a product into mainstream popularity. The increasing popularity of DVR systems, which allow viewers to skip advertisements, has helped increase the use of product placement due to companies trying to find more creative ways of marketing products. The FCC requires television programmers to disclose paid product placements either at the beginning or end of the programs in which they are featured. Some consumer groups and members of Congress have stated that current rules are not strict enough. These same parties are pushing for additional disclosures with some arguing for a disclosure to come at the end of the product placement itself during the program.

FCC Activity

In June 2008, 23 consumer and media advocacy groups sent a letter to the FCC urging it to conduct a Notice of Proposed Rulemaking on product placement. This letter coincided with a letter sent by Representatives Ed Markey (D-MA) and Henry Waxman (D-CA) asking the FCC to conduct an inquiry into the issue. In response, ANA and several other trade associations sent a letter to the Commission urging it to conduct a Notice of Inquiry instead. This issue continues to be pending before the Commission and has come up in the context of other FCC initiatives, such as the FCC NOI on Empowering Parents and Protecting Children in an Evolving Media Landscape. Therefore, we will continue to be very vigilant in regards to any movement on this issue.

Tobacco Advertising

Background

Since the 1998 Master Settlement Agreement (MSA) between tobacco companies and 46 state attorneys general, there have been stringent consensual restrictions on tobacco advertising. The MSA settled most lawsuits at the state level against tobacco companies in exchange for the agreed upon advertising restrictions, which include limits on ad placement, ad content, and sponsorships. As a result, tobacco advertising is now one of the most restricted advertising categories in the United States.

Family Smoking Prevention and Tobacco Control Act

In March 2009, Chairman Henry Waxman (D-CA) of the House Energy and Commerce Committee introduced H.R. 1256, the Family Smoking Prevention and Tobacco Control Act. Concurrently, the late Senator Ted Kennedy (D-MA), who was at that time the Chairman of the Senate Health, Education, Labor, and Pensions (HELP) Committee, introduced S. 982, an identical bill, in May 2009. That bill required the FDA to ban all outdoor advertising of tobacco within 1,000 feet of a school or playground. The bill also mandated that tobacco ads which appear in publications whose readership is less than 85 % adult would consist of only black text on white backgrounds, otherwise known as “tombstone ads.” Such ads would not be allowed to feature other colors, illustrations, or pictures. Promotional items and brand name sponsorships were prohibited under this bill. The bill also lifts federal preemption of tobacco advertising laws and allows states and localities to impose even tougher restrictions on tobacco advertisements than those contained in the federal law.

ANA, along with the American Association of Advertising Agencies (4A's) and the American Advertising Federation (AAF), expressed serious concerns about this bill to the committees in both chambers of Congress that were considering the bill. That letter can be accessed at <http://www.ana.net/advocacy/getfile/15175>. We argued that while the protection of children was a substantial governmental goal, the bill limited the ability of companies to communicate effectively with adults about a legal product. We also argued that the bill allowed for local governments to impose inconsistent restrictions on advertising, making national advertising virtually impossible. ANA also expressed the view that the provisions of the bill were severe restrictions on truthful and non-deceptive speech concerning a legal product and its advertisement directed to adults, violating the First Amendment. We noted that the Supreme Court had struck down similar restrictions in *Lorillard v. Reilly* (2001) and the *Zauderer* case (1985).

Despite a strong lobbying effort by ANA and others in the ad community, the bill passed the House in April 2009 and the Senate in June 2009. The President signed the bill into law in June.

ANA signed on to an amicus (friend-of-the-court) brief with other members of the advertising community in November 2009, which detailed the First Amendment issues with the bill. The brief, submitted in regard to the *Commonwealth Brands, et.al. v. United States of America* case, discussed the First Amendment advertising rights infringed upon by the provisions of the new tobacco legislation. That brief can be accessed at <http://www.ana.net/advocacy/getfile/15431>. A decision in the case was handed down by the U.S. District Court for the Western District of Kentucky in January. The court struck down the provisions concerning colors and image in tobacco advertisements, but it upheld other provisions of the law such as restrictions on sponsorships, brand-name merchandise, as well as the size and graphics requirements of warning labels.

The ruling was appealed to the United States Court of Appeals for the Sixth Circuit as *Commonwealth Brands, et.al. v. United States of America*. In June, ANA, along with the 4A's and the AAF, filed another amicus brief in the case. That brief, which was written by First Amendment attorney Robert Corn-Revere, can be found at <http://www.ana.net/advocacy/getfile/15753>.

We expect this case to go all the way to the U.S. Supreme Court. ANA will continue to participate in this case, which would create very broad and significant precedents for many segments of the advertising community.

FDA Proposed Graphic Warning Labels

On November 10, 2010, the Department of Health and Human Services and the FDA released 36 proposed new images for use as warning labels on cigarette packs and in tobacco advertisements. These proposed new warning labels, which can be accessed at <http://www.fda.gov/downloads/TobaccoProducts/Labeling/CigaretteProductWarningLabels/UCM232425.pdf>, feature color graphic images and large text. The labels feature autopsy photos, cancer patients, gravestones, a mother blowing smoke into her child's face, and other depictions of the negative effects of smoking. The FDA has proposed a rulemaking on this matter and is soliciting comments from the public, which are due by January 9, 2011. The FDA will ultimately select nine of the labels by June 22, 2011 for use as mandated graphic warning labels. By October 2012, it is expected that all tobacco companies will be required to feature one of these labels on all packages of tobacco sold in the United States. ANA published an editorial response in USA Today on this matter, which can be seen at http://www.usatoday.com/news/opinion/editorials/2010-11-26-editorial26_ST1_N.htm. We plan to file comments on these proposed warning labels.

Outlook for 2011

We expect the *Discount Tobacco City & Lottery* case to go all the way to the U.S. Supreme Court. ANA will continue to participate in this case, which would create very broad and significant adverse precedents for many segments of the advertising

community. In addition, we will closely monitor the warning labels rulemaking as it progresses.

Loud Commercials Legislation

Background

Congresswoman Anna Eshoo (D-CA), a member of the House Energy and Commerce Committee, introduced legislation in 2008, H.R. 6209, also known as the Commercial Advertisement Loudness Mitigation Act (CALM Act) that would require the FCC to regulate the sound level in television commercials. The regulations would require that a commercial's volume not substantially exceed the volume of the programs in which they are aired. ANA's DC office received a substantial number of communications from members of the public supporting the legislation. In response, we began actively working with ANA's Television Advertising and Production Management Committees, as well as with a broad range of industry partners on a solution to this problem.

Congressional Activity

Congresswoman Eshoo (D-CA) reintroduced the legislation, this time as H.R. 1084, in February 2009 with 90 co-sponsors, including three chairmen of Energy and Commerce subcommittees: Congressman Rick Boucher (D-VA), Congressman Ed Markey (D-CA), and Congressman Bart Stupak (D-MI). The Energy and Commerce Committee's Subcommittee on Telecommunications and the Internet held a hearing on it in June 2009. Representatives from the broadcast industry, speaking on behalf of the Advanced Television Systems Committee (ATSC), recommended at the hearing that legislative solutions be delayed while the industry developed a self-regulatory program. The ATSC approved a set of self-regulatory principles in September 2009, and at the bill's markup in October 2009, Representative Eshoo introduced a substitute to her legislation that would require the FCC, as part of a rulemaking, to implement the ATSC's standards.

Congresswoman Eshoo's substitute gave the industry one year to comply with the regulations after they are enacted by the FCC, and it also gave the FCC the power to grant up to two one-year waivers in the event of a severe financial hardship. The bill passed the House in December 2009. Similar legislation, S.2847, introduced by Senator Sheldon Whitehouse (D-RI), was also moved through the Senate. On June 9, 2010, the Senate Commerce Committee held a markup at which the bill was considered. At that markup, Senator Claire McCaskill (D-MO), one of the bill's co-sponsors, called the legislation necessary and joked that its passage may boost Congress' approval rating substantially among the public. The bill was favorably reported with an amendment in the nature of a substitute.

On September 29, 2010, the Senate passed S. 2847 unanimously. On December 2, 2010, the House of Representatives passed the bill by voice vote. It was signed into law by President Obama on December 15, 2010.

Outlook for 2011

ANA was pleased that the House and Senate decided to implement the voluntary standards created by the industry as a framework for regulation. We will monitor the implementation of these new regulations.

Rulemakings and Guidelines

Background

The U.S. Congress passed a sweeping reform of the country's financial system in the summer of 2010, which mandated numerous rulemakings and studies. The FTC is currently in the process of updating its green marketing guidelines. The FCC will be mandated by law to conduct a rulemaking on the "loudness" of television commercials. In addition, federal agencies also may be granted new rulemaking powers in the areas of behavioral advertising, advertising to children, DTC prescription drug advertising, and food advertising.

Dodd-Frank Wall Street Reform and Consumer Protection Act

In response to the severe economic recession and the near collapse of several major banks in 2008, Congress passed a sweeping reform of the financial system in 2010. The bill is named the Dodd-Frank Act after the two chairmen largely responsible for shepherding it through Congress, Senator Chris Dodd (D-CT, the Chairman of the Senate Banking Committee, and Congressman Barney Frank (D-MA), the Chairman of the House Financial Services Committee. The act created the Consumer Financial Protection Bureau, which will work alongside the FTC in carrying out oversight of marketing of financial services and products.

As the legislation was debated, there were attempts by lawmakers to broadly expand the rulemaking power of the FTC, and the initial legislation would have repealed the FTC rulemaking powers established under Magnuson-Moss in the 1970's. Such proposals would have allowed the FTC to create rulemakings rapidly without many procedural requirements and would have permitted the FTC to impose multi-million dollar civil penalties for violations of the FTC Act without the advice of the Justice Department. These proposed rulemaking powers were ultimately defeated and were not included in the final passage of the bill. ANA, along with its partner associations, worked to prevent the inclusion of these provisions, which we believed were ill-conceived. Two key chairmen, Representative Henry Waxman (D-CA) of the House Energy and Commerce Committee and Senator John D. Rockefeller (D-WV) of the Senate Commerce Committee, have pledged to keep pushing for these changes.

The final bill, which was signed into law in July, requires 243 rulemakings, as well as 67 studies. These rulemakings and studies fall under the jurisdiction of 11 different federal agencies. The ultimate results of this large number of rulemakings remain unclear, but it is assured that they will shine a continuing spotlight on financial marketing for some time to come. ANA will closely monitor the rulemakings which may affect the interests of the advertising community and will be vigilant to any rulemakings which may adversely affect advertisers.

Green Marketing Guidelines

In 1992, the FTC published “Environmental Marketing Guides,” which provide companies with guidance about standards for green marketing terms like biodegradable and recycled content. These guides were updated in 1996 and 1998. Due to a rapid increase in green marketing claims in recent years, the FTC began holding a series of workshops on green marketing guidelines in 2008. The FTC, on October 6, 2010, announced wide-ranging proposed updates to the guidelines. The proposed updates, which can be found at <http://www.ftc.gov/opa/2010/10/greenguide.shtm>, include the descriptions of how the FTC will treat new green marketing terms such as renewable energy. Though these guidelines do not have the force of regulations or laws, they do provide important insight to companies about how the FTC will scrutinize green marketing claims. ANA filed comments on the proposed updates to the guidelines, which can be accessed at <http://www.ana.net/getfile/16033>.

Food Advertising

As a result of the appropriations bill passed by Congress in 2009, an Interagency Working Group (IWG) composed of the FDA, the FTC, the CDC, and the USDA was created to study the possible need for standards regarding the marketing of foods and beverages to children. Draft guidelines were published in December 2009. If they had been followed by the food and beverage industry, they would have ended a vast amount of food advertising to children under the age of 18. The release of final guidelines, as well as a subsequent report to Congress, has been delayed. Depending on the language of the guidelines, new rulemakings may be enacted on food advertising to children in one or more federal agencies. ANA has worked on self-regulatory principles for food advertising to children, such as the Children’s Food and Beverage Advertising Initiative. We will be very mindful of any new rulemakings in the food advertising arena which may have adverse effects on our industry.

Food and Drug Administration Proposed Rulemaking Amendments

The FDA issued a proposed rule in March which would alter its current DTC prescription drug advertisement regulations. The proposed new rule would require that the warning statement about possible side effects from prescription drugs during advertisements to be “clear, conspicuous, and neutral.” The Advertising Coalition, of which ANA is a key member, filed comments on this topic in early July, which argued that an advertisement was inherently neutral if the possible side effects were not overstated or understated. Our comments can be accessed at <http://www.ana.net/advocacy/getfile/15791>. ANA will continue to monitor the progress of this proposed rulemaking and will be vigilant of any threat to the interests of DTC prescription drug advertising which may emerge as a result.

There were six other FDA notices in the Federal Register concerning prescription drug and over-the-counter drug advertising. In January, the FDA invited comments on a study it was conducting on consumers’ understanding of the efficacy of drugs in

advertisements. In March, the FDA asked for comments on the necessity of using focus groups in carrying out its regulatory functions. The FDA, in June of this year, submitted a notice for comments on a study it planned to conduct concerning the risk assessments made by physicians and consumers in response to print DTC prescription drug advertisements. Along a similar track, the FDA asked for comments on a study concerning different methods of presenting information about risks and benefits of a drug in print DTC advertisements. In August, the FDA published guidance to the drug industry on methods to use when conducting studies on label comprehension of over-the-counter drugs. Finally, the FDA requested comments in September of this year on a study it plans to conduct concerning the impacts that coupons and purchase incentives have on consumers' perceptions of risks and benefits in prescription drug advertisements. All of these requests for comments, and any subsequent studies produced, may lead to new rulemakings that could affect the interests of advertisers. In addition, as part of the Food and Drug Administration Amendments Act (FDAAA) of 2007, the FDA was instructed to study the effects of DTC prescription drug advertising on the elderly, children, and racial and ethnic minorities. Any report issued in response to this requirement may lead to further FDA rulemakings that also could impact the interests of DTC prescription drug advertising.

CALM Act

Congresswoman Anna Eshoo (D-CA) introduced the Commercial Advertisement Loudness Mitigation Act (CALM Act) in 2008. This legislation called on the FCC to regulate the volume of television commercials. After fielding numerous complaints from the public, ANA worked with a broad range of industry partners on a solution. The Advanced Television Systems Committee recommended at a markup hearing on the legislation in June 2009 that legislative activity be delayed until the industry developed self regulatory standards. In September 2009, the ATSC released a set of self-regulatory principles. In response, Congresswoman Eshoo introduced a substitute amendment to her legislation in October 2009, which required an FCC rulemaking that would implement the ATSC standards. The House of Representatives passed the bill in December 2009, and nearly identical legislation passed the Senate in September. The House passed the bill by voice vote in December, and the bill was signed into law by the President. The FCC will now be tasked with implementing the rulemaking.

FCC Advertising to Children Notice of Inquiry

Despite existing limits on advertising that can be aired during children's programming on television, the FCC issued a Notice of Inquiry (NOI) in October 2009, entitled "Empowering Parents and Protecting Children in an Evolving Media Landscape." It asked for comments on potential harms and risks of exposure to children in ads, impacts on children of advertising in digital media, the effectiveness of current restrictions on children's advertising, the effectiveness of self-regulatory efforts such as the Children's Food and Beverage Advertising Initiative, and the potential necessity and feasibility of allowing parents to block advertisements to children. ANA filed comments on this NOI,

which can be found at <http://www.ana.net/advocacy/getfile/15664>. Our comments urged caution on the part of the FCC and noted the steps taken by the industry to self-regulate advertising to children. It remains possible that the FCC may pursue a rulemaking in response to the NOI. ANA will carefully monitor any possible rulemaking in this area that may threaten the interests of advertisers.

Behavioral Advertising

The practice of behavioral advertising has come under intense scrutiny in the past year as concerns about online privacy have heated up in the Congress. Two bills were introduced in the House of Representatives, which both provide a broad scope of authority over data collection in the online and offline worlds. In addition, the Chairman of the FTC, Jon Leibowitz, has expressed interest in implementing a “Do-Not-Track Mechanism” for behavioral advertising, which would be similar to the “Do-Not-Call” registry already in place. Senator Mark Pryor (D-AR) has strongly supported an FTC rulemaking which would allow for a “Do-Not-Track Mechanism.” ANA, in conjunction with other advertising trade associations, introduced a self-regulatory program for behavioral advertising in October. In December, both the FTC and the Department of Commerce released separate privacy reports. The FTC recommended the implementation of a “Do-Not-Track” mechanism, while the Commerce Department’s report called for a “privacy bill of rights” and for “voluntary, enforceable privacy codes of conduct” that would be based on “fair information practice principles.” Both reports issued in December have potentially far-reaching recommendations, and ANA is working on comments to both agencies. These comments may determine whether the future of privacy regulation is pursued through industry self-regulation or legislation.

Outlook for 2011

Despite the changes in power in Congress that have resulted because of the 2010 midterm elections, there exist mandates for a virtually unprecedented number of rulemakings at the regulatory agencies which could affect advertising. These rulemakings will likely continue to move forward. Therefore, ANA will need to closely monitor any forthcoming rulemakings or proposals for regulatory agency rulemakings in order to protect the interests of the advertising community.

Legal Developments

Background

ANA tracks numerous court cases at both the federal and state level each year that deal with commercial speech issues. We also participate in many of these cases, through the filing of “friend-of-the-court” briefs. Over the past 40 years, the courts have granted increased protection to commercial speech under the First Amendment. The Court’s current level of protection for commercial speech can be summed up in this quote from Justice Sandra Day O’Connor speaking for the majority of the Court in the 2002 *Thompson v. Western States Medical Center* case: “If the First Amendment means anything, it means that regulating speech must be a last – not first – resort.”

Pending and Recently Decided Advertising Cases

Discount Tobacco City & Lottery, Inc et al v. United States of America

In 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act into law, giving the Food and Drug Administration for the first time authority over tobacco products and their marketing and advertising. Soon after, a challenge against the advertising provisions contained in the law was initiated by six major tobacco companies in the U.S. District Court for the Western District of Kentucky (as *Commonwealth Brands, Inc. v. United States of America*). These advertising provisions, that were under review were the most stringent ever passed into law by Congress. They include bans on color and graphics in ads, mandated warning text and images, and a ban on outdoor advertising and point-of-sale communications. The suit contended that the government goes too far in restricting speech directed at a legal audience in advancing its legitimate interest in reducing youth tobacco use, and is thus unconstitutional.

ANA joined in a “friend-of-the-court” brief with the 4As and AAF. We believe if allowed to stand, these restrictions would serve as a template for limiting many other controversial categories of advertising. Our brief argued that Congress overlooked a number of less restrictive alternatives that could have achieved the objectives of discouraging smoking and protecting minors without restricting speech – and that these alternatives would in fact be more effective. Our brief is available at <http://www.ana.net/advocacy/getfile/15431>.

In January, the District Court held that the ban on colors and images in ads was too broad and unconstitutional. However, the court upheld other speech restrictions, including those on sponsorships, outdoor advertising, and the language and graphics required in warning labels. Both sides in this case cross-appealed to the U.S. Court of Appeals for the Sixth Circuit. We have filed a further “friend-of-the-court” brief in this case as well, arguing that the lower court seriously erred in upholding most of the Act’s marketing restrictions. We contend that the District Court should have struck down all of the marketing restrictions as overly broad and unconstitutional. This brief can be found at <http://www.ana.net/getfile/15753>.

We are awaiting a decision from the Sixth Circuit Court of Appeals.

Educational Media Co. at Va. Tech, Inc. v. Swecker

The Commonwealth of Virginia prohibits advertisements for alcohol beverage products in college student publications, such as student-edited newspapers and other publications intended to be distributed primarily to persons under 21 years of age. The student newspapers at Virginia Tech and the University of Virginia challenged the ban, claiming it violates the First Amendment. The U.S. District Court for the Eastern District of Virginia struck down the ban, holding that it did violate the newspapers' First Amendment rights. On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed in a 2-1 decision. It held, using the test laid out in the U.S. Supreme Court's *Central Hudson* case, that the law materially advanced the government's interest in decreasing demand for alcohol beverage products among college students and preventing underage drinking. It also found that the law was sufficiently narrowly tailored in that it was limited to certain types of ads and in publications targeted at a readership under 21. The Court of Appeals admitted, however, that the majority of students of the college were above the legal drinking age but still upheld the ban. The student newspapers appealed the decision.

In a similar challenge heard by the Third Circuit in 2004, *Pitt News v. Pappert*, then- Appeals Court Judge Samuel Alito (now a Justice on the U.S. Supreme Court) found that the ban at issue there violated the First Amendment, also applying the *Central Hudson* test. ANA, with the 4A's and AAF, filed a cert petition requesting review of the Educational Media Company decision by the U.S. Supreme Court. ANA and our sister associations argued that the Court has given increasing protection to commercial speech and has repeatedly refused to let stand restrictions on speech to general audiences based on such a sweeping child protection rationale. The brief can be viewed at <http://www.ana.net/getfile/15868>. Unfortunately, in November, the Supreme Court refused to take review of the case, leaving the two inconsistent Court of Appeals decisions in this area. Hopefully, the Supreme Court will resolve this issue in favor of commercial speech in the future.

Schwarzenegger v. Entertainment Merchants Association et al.

California passed a law in 2005 that prohibits the sale or rental of "violent video game[s]" to persons under 18 years of age. A "violent video game" is defined in the law as a game including killing, maiming, dismembering or sexually assaulting an image of a person, if depicted in a way that a reasonable person would find appeals to a morbid interest to minors, is offensive to prevailing community standards, or causes the game to lack serious literary, artistic, political or scientific value for minors. Parents and guardians were still permitted to rent or purchase games on a minor's behalf. Suit was filed in the U.S. District Court for the Northern District of California alleging the law violated the First Amendment and seeking an injunction against enforcement.

The District Court found that the law did violate the First Amendment. The court held that while the government has a compelling interest in protecting minors, it did not prove that video games were any different from other media or that they led to violent behavior, which was the main justification propounded for the law. The U.S. Court of Appeals for the Ninth Circuit agreed, and California filed a petition for cert with the U.S. Supreme Court. The Supreme Court heard the case on November 2. ANA has joined a “friend-of-the-court” brief filed in conjunction with various publishers and recording groups to the Supreme Court. The brief argues that the Supreme Court has long refused to carve out a distinction under the First Amendment for violent materials and discussed the long history of textual and visual depictions of violence in art and literature. The brief contends that the justifications California made for the law are not sufficient to withstand Constitutional scrutiny. This case is particularly ironic as California Governor Arnold Schwarzenegger’s movie career was propelled by a number of movies containing substantial violent content and that spawned a number of related video games. The brief can be viewed at <http://www.ana.net/getfile/15862>.

IMS Health cases

Vermont, New Hampshire and Maine have passed similar legislation banning the use of physician histories for commercial purposes, including their use in marketing prescription drugs to doctors, which is known as “detailing.” New Hampshire, which passed its law first, claimed in response to a challenge to the law in federal court (*IMS Health v. Ayotte*) that the law did not regulate speech, and even if a court determined that it did, the state has an interest in promoting public health and protecting patient privacy. The U.S. District Court for the District of New Hampshire disagreed, finding the law violated the First Amendment under the U.S. Supreme Court’s *Central Hudson* test. New Hampshire appealed to the U.S. Court of Appeals for the First Circuit, which held in late 2008 that the law was constitutional as it regulated “conduct” and not “speech,” and thus the higher level of scrutiny given commercial speech restrictions under *Central Hudson* did not apply. Under the lowest level of constitutional scrutiny, known as rational basis, the state merely needed to show its actions were rationally related to a legitimate government interest, and the court would be required to uphold the law.

The U.S. Supreme Court declined to hear the case in 2009. ANA previously had filed a brief with the Supreme Court arguing that whole categories of speech would be found to be impermissible if judged under the lesser level of scrutiny used by the First Circuit in *Ayotte* and that defining speech activity as conduct severely undermines First Amendment values. Our brief can be viewed at <http://www.ana.net/advocacy/getfile/15130>. The First Circuit also upheld the challenge to the Maine law (*IMS Health v. Mills*) on similar grounds.

In the Vermont case (*IMS Health v. Sorrell*), the U.S. District Court for the District of Vermont held that the law violated the First Amendment. The U.S. Court of Appeals for the Second Circuit heard arguments in October 2009 and reached a decision in November 2010. The Second Circuit agreed with the District Court and upheld its ruling

that the law violated the First Amendment. The state has appealed to the U.S. Supreme Court, which announced in January 2011 that it will hear the case.

FCC v. Fox Television Stations et al.

In 2004, the FCC changed its policy on “fleeting expletives,” making even a single, inadvertent airing of an expletive a violation of its rules against broadcast indecency. The previous policy, in place since the U.S. Supreme Court’s 1978 *Pacifica* case (the “seven dirty words” case), subjected broadcasters to fines after repeated indecency violations. After changing the indecency rules in this area, the FCC proceeded to impose substantial fines on broadcasters for violations where fleeting expletives were aired during live television broadcasts. The U.S. Court of Appeals for the Second Circuit overturned the fines and raised questions about the FCC’s actions on First Amendment grounds. On appeal to the U.S. Supreme Court, the Court upheld the FCC policy on other grounds and did not reach the First Amendment issues. The court did indicate, however, that the policy might not withstand further constitutional scrutiny.

The case was remanded to the Second Circuit, which struck down the fleeting expletives policy again in July, finding them too vague to withstand First Amendment scrutiny. The FCC is appealing to the full Second Circuit, which agreed with the panel’s decision in early January 2011. While advertisers generally do not face these types of indecency issues, the court’s analysis of the FCC’s authority to regulate broadcasting more stringently than other media under the First Amendment is likely to affect other issues of key importance to advertisers.

Outlook for 2011

It has been a number of years since there were this many important and wide-ranging cases pending at the federal level dealing with commercial speech. Many of these cases will decide whether advertising continues to receive the increased First Amendment protection established by the past 40 years of Supreme Court jurisprudence or whether a new, more restrictive commercial speech regime emerges. With two new members joining the court in the past two years, some important signals for the future are likely to emerge. ANA has been very active in participating in “friend-of-the court” briefs in 2010 and will participate where appropriate in 2011. It is critically important for all advertisers that their rights provided by the First Amendment remain fully protected, and ANA will continue to ensure our arguments are heard by the courts.

International Developments

Background

ANA closely follows advertising developments and issues that occur internationally. ANA is a member of the board of the World Federation of Advertisers (WFA), which is a global federation of multinational companies and national trade associations that advocate responsible and effective advertising practices around the world. This year has seen several important developments in advertising issues internationally. As in the US, the privacy issue has heated up significantly in the EU. In addition, food advertising to children was a topic of debate in other countries.

Article 29 Working Party Opinion on Behavioral Advertising

In October 1995, the EU instituted the Data Protection Directive (95/46/EC) in order to protect an individual's right to know personal data was being collected and to ensure the security of that collected data. Under Article 29 of the Directive, a "Working Party on the Protection of Individuals With Regard to the Processing of Personal Data" was established. This Working Party is comprised of representatives from each member state.

In June, the Working Party released an opinion on online behavioral advertising. The opinion noted the benefits of behavioral advertising, but it also expressed concern about individual privacy. The Working Party called for opt-in consent by individuals before cookies could be used for the purposes of behavioral advertising. The Working Party's Opinion can be viewed at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf. The World Federation of Advertising (WFA), of which ANA is a member, responded to the recommendations put forth by the Working Party and noted that such recommendations would undermine both the efficiency and the potential economic benefits of the Internet. The WFA's response can be viewed at http://www.wfanet.org/press_releases.cfm?id=49. Opinions put forward by the Working Party are not legally binding. Nonetheless, this issue will need to be monitored by the ANA, as any privacy regulation in the European Union could affect our member's interests. In addition, any new regulatory action seen in EU member states could serve as a model for future regulatory models in the US.

The World Health Assembly

The World Health Assembly (WHA), which is the governing body of the World Health Organization (WHO), adopted new recommendations for advertising food to children. These recommendations are available at http://apps.who.int/gb/ebwha/pdf_files/WHA63/A63_12-en.pdf. Among them are calls for the reduction of children's exposure to ads for foods with high fat and sodium content, standardization of terms such as the age of a child and "high fat foods, and making locations frequented by children free of ads for unhealthy foods. The

recommendations also call for governments to take the lead in policies aimed at reducing food advertising to children. Finally, the recommendations call for policies that can be made meaningful through enforcement and review of effectiveness.

EU Platform for Action on Diet, Physical Activity, and Health

In 2005, the European Commission established the EU Platform for Action on Diet, Physical Activity, and Health. Its stated purpose was to find a way to combat the growing rates of obesity in Europe. It brought together representatives from governments of EU member states, the food and beverage industry, and NGOs. In 2010, an evaluation of the Platform's success and effectiveness since its inception was undertaken. The evaluation found that self-regulatory efforts in the arena of reducing the amount of food and beverage advertisements targeted to children had been effective. It was also found that amounts of sugar and sodium had been reduced in foods over the last five years. The full evaluation can be accessed at http://ec.europa.eu/health/nutrition_physical_activity/docs/eu_platform_2010frep_en.pdf.

United Kingdom Childhood and Families Task Force

The coalition government leading the United Kingdom, under Conservative Prime Minister David Cameron and Liberal Democrat Deputy Prime Minister Nick Clegg, established a Childhood and Families Task Force in June. Deputy Prime Minister Clegg has been quoted as saying that the Task Force will work to preserve the innocence of childhood by cracking down on irresponsible advertising to children. In particular, Clegg vowed to oppose advertising that is believed to "sexualize" children. Mr. Clegg noted that children often remember advertisements better than they do television programs. The Task Force is expected to release a report in the near future.

Outlook for 2011

ANA will continue to monitor developments in the international sphere that affect advertising, and we will continue working with international partners to help educate policymakers worldwide about the benefits of advertising and the self-regulatory programs being pursued by the industry. Laws pertaining to the online world have the capability to affect the interests and actions of ANA members. Also, laws overseas also serve as models for regulatory action in the US. Therefore, it will be necessary for ANA to remain vigilant concerning advertising trends worldwide.

SAG/AFTRA and AFofM Labor Contracts Developments

Background

ANA and the American Association of Advertising Agencies (4A's) negotiate labor agreements for commercial actors with the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA) through the Joint Policy Committee (JPC). The JPC is drawn from ANA's advertiser membership and 4A's agency experts who help oversee the contract negotiation process. Also, similarly, the JPC negotiates contracts with the American Federation of Music (AFofM) concerning the compensation of musicians who perform in ads. Doug Wood of Reed Smith LLP and ANA's General Counsel, is the prime negotiator for industry in these negotiations.

The SAG/AFTRA agreements are one of the major and largest labor agreements in the United States with nearly \$3.1 billion in compensation over three years. In 2009, both parties negotiated a new three year contract with no increase in compensation in the second and third years, a cap on pension and health fund payments, and, in a historic step, an agreement to conduct a groundbreaking pilot study of a new approach to actor compensation based on gross ratings points (GRP).

Status

A pilot test of the new GRP compensation model is underway under the auspices of Pricewaterhouse Coopers. Over 2,000 commercials are being tested from a broad cross-section of advertisers to see if the new model will work. Our task has been urging advertisers to participate in the pilot program to ensure it will be effective in distributing costs equitably. If advertisers do not participate, they will have no opportunity to raise real, measurable concerns and the JPC will not have an opportunity to take those concerns into consideration in the next round of negotiations.

Meanwhile, in April, the JPC reached a new three year agreement with the AFofM that included a modest wage and pensions increases. The new agreement can be viewed at <http://www.ana.net/advocacy/getfile/15674>.

Outlook for 2011

The results of the pilot will be the centerpiece of negotiations with the unions scheduled to begin in October 2011. For the first time since the union agreements were adopted in the 1950's, there will be a measurable correlation between what an advertiser pays actors and the ROI relating to these costs. We will continue to work with the unions and hope the collegiality that marked negotiations in 2009 will typify the upcoming negotiations as well.

Self-Regulation

Background

The advertising community has been a leader for decades in self-regulation to the benefit of both consumers and the marketplace. Some important examples of such self-regulatory practices include the National Advertising Review Council (NARC), the Children's Food and Beverage Advertising Initiative (CFBAI), and the recently launched self-regulatory program for behavioral advertising.

National Advertising Review Council

The National Advertising Review Council (NARC) was formed in 1971 as the result of a partnership between ANA, the American Association of Advertising Agencies (4A's), the American Advertising Federation (AAF), and the Council of Better Business Bureaus (CBBB). NARC was established by that partnership as an independent self-regulatory body with the mission of promoting truth and accuracy in advertisements. The Direct Marketing Association (DMA), the Electronic Retailing Association (ERA), and the Interactive Advertising Bureau (IAB) all joined as partners of NARC in 2008. NARC oversees policies for four self-regulatory programs: the National Advertising Division (NAD), the Children's Advertising Review Unit (CARU), the National Advertising Review Board (NARB), and the Electronic Retailing Self-Regulatory Program (ERSP). NAD provides a review process for the truthfulness and accuracy of advertisements in general. CARU provides self-regulatory guidelines for advertising to children. The NARB serves as an appeals body for decisions or recommendations made by the NAD or CARU. The ERSP provides monitoring of direct response advertising campaigns. More information about NARC and its various self-regulatory programs can be found at <http://www.narcpartners.org>.

Children's Food and Beverage Advertising Initiative (CFBAI)

The Council of Better Business Bureaus (CBBB) also launched the Children's Food and Beverage Advertising Initiative (CFBAI) in November of 2006. Originally, participating companies were required to devote at least 50 percent of their ads targeted to children under the age of 12 to foods that were healthier or "better for you." For a food to qualify as "healthier" or "better for you," it had to meet established scientific and government standards, such as those used by the USDA. Participating companies also agreed to limit the use of third-party characters in advertising foods and beverages to children, and they agreed to not carry out product placement in television programs directed towards children under the age of 12. In addition, participants in this self-regulatory program agreed not to advertise their products in elementary schools.

As of January 2010, participants devote 100 percent of ads targeted to kids to foods and beverages which promote healthier lifestyles. The initiative was also expanded, in order to include video games directed to children and word-of-mouth advertising targeted to

children. Seventeen companies currently participate in the initiative. These advertisers carry out about 80 percent of all food and beverage ads directed to children 12 and under in the United States. More information on this self-regulatory program is available at <http://www.bbb.org/children-food-beverage-advertising-initiative>.

Self Regulatory Program for Online Behavioral Advertising

In July 2009, ANA, along with the Direct Marketing Association (DMA), the American Association of Advertising Agencies (the 4A's), the Council of Better Business Bureaus (BBB), and the Interactive Advertising Bureau (IAB), endorsed a "Self-Regulatory Program for Online Behavioral Advertising." The program is based upon seven principles: education, transparency, consumer control, data security, material changes, sensitive data, and accountability. This groundbreaking document, which is available at <http://www.ana.net/advocacy/getfile/15279>, served as a foundation for the development of a new self-regulatory behavioral advertising program. This program was launched on October 4, 2010. A press release about the program launch is available at <http://www.ana.net/content/show/id/oba-self-reg-release>. The five groups responsible for this program are in the process of fully implementing the procedures and enforcement mechanisms of the program.

Outlook for 2011

ANA will continue to support the continued strengthening of self-regulatory programs for advertisers. ANA will work with its partners to ensure a smooth operation of the new behavioral advertising self-regulatory program. Where possible, ANA will work with others in the advertising industry to develop and implement self-regulatory guidelines that protect the interests of consumers while allowing for the continued economic success of advertising.

ANA Advertising Law and Public Policy Conference

ANA held its sixth-annual Advertising Law and Public Policy Conference on March 17-18 in Washington, DC. For ANA's 100th anniversary, we moved the conference to Washington and put more emphasis on government and regulatory issues, while retaining our strong slate of experts from law firms and client-side marketers discussing the top legal issues facing the advertising industry.

This year's conference was highlighted by presentations from Jon Leibowitz, the Chairman of the Federal Trade Commission, Doug Gansler, the Attorney General of Maryland, Joshua Sharfstein, Principal Deputy Commissioner of the Food and Drug Administration, and Joel Gurin, Chief of the Consumer and Governmental Affairs Bureau at the Federal Communications Commission. Sessions on green marketing, intellectual property and social media were among the highlights on the agenda. We also focused on the political challenges confronting the industry, from the proposed expansion of the FTC's rulemaking power to FCC rulemakings affecting children's advertising and marketing.

Dan Jaffe and ANA's General Counsel, Doug Wood, are co-chairs of the conference with major planning conducted by the Washington, DC office. Planning is now underway for the 2011 conference, which will be held March 15-16 at the Park Hyatt in Washington, DC. More information about the upcoming conference can be found at <http://www.ana.net/conference/show/id/LAW-MAR11>.

Coalitions

ANA is an active member of The Advertising Coalition, the Alliance for American Advertising, the Freedom to Advertise Coalition (FAC), and the State Advertising Coalition (SAC). These coalitions bring together a diverse set of groups who share an interest in protecting advertisers' rights. They provide a united front in lobbying Congress and government agencies on advertising community issues, and they also serve to strengthen ANA's individual efforts.

The Advertising Coalition (TAC)

The Advertising Coalition was originally established in 1988 for the purpose of directing the fight against federal ad tax proposals. In the years since, it has expanded its scope to general advertising issues. In 2004, the Coalition sponsored the Global Insight Study, which was carried out by Nobel Laureate in Economics, Lawrence Klein. That study demonstrated the enormous economic impacts of advertising on the national economy, state economies, and in each congressional district. There are eight members of the Coalition: ANA, the American Advertising Federation (AAF), the American Association of Advertising Agencies (4 A's), the Grocery Manufacturers Association (GMA), the Magazine Publishers of America (MPA), the National Association of Broadcasters (NAB), the National Cable and Telecommunications Association (NCTA), the Newspaper Association of America (NAA), and the Pharmaceutical Research and Manufacturers of America (PhRMA).

ANA has taken actions in the last year, in conjunction with the Coalition, which have been crucial in blocking proposals for the elimination of ad tax deductions in regard to prescription drug advertising. These multi-billion dollar proposals, which came up more than once during the health care reform debate, were supported by many powerful members of Congress, including the Chairman of the House Ways and Means Committee. An updated version of the Global Insight Study is due to be released in October of 2010. This document will provide important insights about advertising's continued crucial role in the U.S. economy, particularly during this current difficult economic period.

The Alliance for American Advertising (AAA)

The Alliance for American Advertising was created by the advertising and media industries for the purpose of demonstrating the industry's commitment to responsible advertising. The AAA consists of major national advertisers, manufacturers, and advertising and media professionals who are prepared to increase their already substantial efforts to educate the public on obesity and support effective ways to reverse this trend in American society and to deal with other major issues facing the advertising community.

Charter members of the Alliance, in addition to ANA, include the American Advertising Federation (AAF), the American Association of Advertising Agencies (4 A's), and the Grocery Manufacturers of America (GMA). Other members are the Snack Food Association, the National Restaurant Association (NRA), the Magazine Publishers of

America (MPA), the Point of Purchase Advertising International (POPAI), the National Cable & Telecommunications Association (NCTA), the National Association of Broadcasters (NAB), General Mills, Kellogg Company, Kraft Foods, and Pepsico, Inc. In 2010, The Alliance played an active role in opposing the provisions for a broad expansion of FTC powers that were included in the House version of the Financial Reform Bill. Had the provisions in the House bill passed, the interests of advertisers would have been negatively impacted, as the proposal provided far fewer procedural requirements for FTC rulemakings and the imposition of civil penalties. ANA participated in more than 100 meetings concerning this issue and wrote numerous letters to key legislators in opposition.

In the past, the AAA has set up grassroots meetings between members of Congress and local advertisers in order to educate the members on concerns related to food and beverage advertising. Presently, the AAA is awaiting the final release of the Interagency Working Group's proposals in regard to food and beverage advertising to children ages 17 and under. The initial draft of this proposal, which was released in December of 2009, recommended substantial restructuring of food and beverage advertisements directed to "children" age 17 and under. ANA, as a member of the Alliance, will remain active in responding to any threats to the ability of food marketers to advertise.

Freedom to Advertise Coalition (FAC)

The Freedom to Advertise Coalition is an informal coalition with the purpose of opposing any proposed restrictions to truthful or non-deceptive advertising of any legal products or services. Members of FAC include the ANA, the AAF, the 4A's, the 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

In 1986, ANA, the American Association of Advertising Agencies (4 A's), and the American Advertising Federation (AAF) formed the State Advertising Coalition. Its purpose is to provide information and resources needed 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. SAC's work may be increased next year due to the major budget crises facing the vast majority of states. As governments struggle to make up budget shortfalls, ad taxes may be looked to by state policy makers as a significant source of revenue.

