ANA's Legislative, Regulatory, and Legal Tracking System
For the 112th Congress (2011-2013)

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Privacy Legislation

Privacy issues have been extremely active in recent years. In past Congresses, numerous privacy bills have been introduced. In the Senate, Senators Dianne Feinstein (D-CA) and Richard Shelby (R-AL) have long called for wide-ranging privacy legislation. In the House, former Energy and Commerce Committee Chairman Joe Barton (R-TX) has strong views on this issue. Rep. Cliff Stearns (R-FL), former Chairman of the Consumer Protection subcommittee, also has pushed online and offline privacy legislation in the past. In recent years, legislation has transitioned from general privacy issues to more specific issues such as data security, "spyware," and behavioral advertising

The FTC is also becoming more active in this area. It recently urged action on behavioral advertising practices. ANA has met frequently with the FTC to urge self-regulation and enforcement of existing laws and regulations rather than the enactment of new laws. We have developed a self-regulatory program for online behavioral advertising, which promotes transparency, notice and choice for consumers. More information on the program can be viewed at http://www.aboutads.info.

Privacy Legislation in the 112th Congress: Senate

Bill Number	*Bill Title*
S. 799	Commercial Privacy Bill of Rights Act of 2011
Sponsor	*Description*
Kerry (D-MA)	This bill requires entities that collect personally identifiable information to establish a comprehensive privacy program to safeguard personal information . It requires the FTC to conduct rulemakings requiring companies to provide clear, concise and timely notice of information collection practices and to provide consumers with the ability to exercise choice as follows: opt-in for collection, use or transfer of "sensitive personally identifiable information" and opt-out of collection, use or transfer of all other data. It requires a robust, clear, and conspicuous mechanism for opt-out consent for the use of data by third parties in behavioral advertising. It further requires that companies provide consumers with access to all personally identifiable information about them and a mechanism to correct such information. It establishes the FTC as primary enforcer of new rules but state attorneys general could also enforce the law subject to FTC intervention, preempts state laws in this area and specifically provides no private right of action. It also establishes a "safe harbor" program to be administered by FTC that would establish a mechanism for implementation of the law's requirements.
Cosponsors	*History*
2 (lead cosponsor is McCain (R-AZ))	4/12/2011: Bill Introduced 4/12/2011: Referred to Senate Committee on Commerce, Science and Transportation

Bill Number	*Bill Title*
S. 913	Do Not Track Online Act
Sponsor	*Description*
Rockefeller (D-WV)	This bill requires the FTC to establish a mechanism by which consumers can indicate they wish not to have their information collected by providers of online services. Enforcement of the rules is given jointly to the FTC and state attorneys general. Penalties up to $15 million may be imposed for violations.
Cosponsors	*History*
2 (Brown, D-OH;	5/9/2011: Bill Introduced

Blumenthal, D-CT)	5/9/2011: Referred to Senate Committee on Commerce, Science and Transportation

Bill Number	*Bill Title*
S. 1151	Personal Data Privacy and Security Act of 2011
Sponsor	***Description***
Leahy (D-VT)	This bill sets disclosure and accuracy rules for data brokers, including allowing consumer access to data and setting up a dispute mechanism, and sets penalties for violations. It also requires covered entities to create a data privacy and security program to protect and secure sensitive data and requires a periodic assessment of data privacy and security systems. It requires notice to individuals in the event of a security breach. It criminalizes certain activities, such as intentionally accessing personally identifiable information and concealing security breaches.
Cosponsors	***History***
4 (Cardin, D-MD; Franken, D-MN; Schumer, D-NY; Blumenthal, D-CT)	6/7/2011: Bill Introduced 6/7/2011: Referred to Senate Committee on the Judiciary 9/7/2011: Hearings Held 9/22/2011: Ordered to be reported with amendments favorably. Reported by Senator Leahy with an amendment in the nature of a substitute. Without written report. Placed on Senate Legislative Calendar under General Orders. Calendar No. 181. 11/7/2011: By Senator Leahy from Committee on the Judiciary filed written report. Report No. 112-91. Additional and Minority views filed.

Bill Number	*Bill Title*
S. 1207	Data Security and Breach Notification Act of 2011
Sponsor	***Description***
Pryor (D-AR)	This bill requires the FTC to promulgate rules under 5 USC 553 that would require entities that collect and use personal information (or contract out to third parties to maintain consumer data) to establish policies and procedures relating to information security practices, which must be submitted for review to the FTC. Consumers must be permitted to access data on them at least one time per year at their request and must be provided a mechanism for disputing data. It also requires notice to consumers and to the FTC within 60 days in the event of a security breach. Enforcement is shared by the FTC and state attorneys general with civil penalties for violations up to $5,000,000. It also preempts state laws in this area.
Cosponsors	***History***
1 (Rockefeller, D-WV)	6/15/2011: Bill Introduced 6/15/2011: Referred to Senate Committee on Commerce, Science and Transportation Related Bill: H.R. 1707 (Rush); H.R. 2577 (Bono Mack)

Bill Number	*Bill Title*
S. 1212	Geolocational Privacy and Surveillance Act (GPS Act)
Sponsor	***Description***
Wyden (D-OR)	This bill prohibits the intentional interception, disclosure or use of data regarding the location of a wireless communications device. It contains exceptions for prior consent, data collected in the normal course of business and in emergency

	situations. It would prohibit individuals or law enforcement from using location data from electronic devices without a warrant. Violators face fines up to $10,000 and up to five years in prison.
Cosponsors	***History***
1 (Kirk, R-IL)	6/15/2011: Bill Introduced 6/15/2011: Referred to Senate Committee on the Judiciary Related Bill: H.R. 2168 (Chaffetz)

Bill Number	***Bill Title***
S. 1223	Location Privacy Protection Act of 2011
Sponsor	***Description***
Franken (D-MN)	This bill prohibits covered entities from knowingly collecting, receiving, recording, obtaining, or disclosing geolocation data without prior express consent from the individual operating the device (with exceptions for public safety). In obtaining express consent consumers must be notified what information will be collected and to whom it may be disclosed. Enforcement is shared by federal and state authorities and consumers are allowed to bring a private right of action. It also sets fines and up to two years in prison for the knowing sale of geolocation data belonging to children under 11 years of age.
Cosponsors	***History***
6 (Blumenthal, D-CT; Coons, D-DE; Durbin, D-IL; Menendez, D-NJ; Sanders, I-VT; Feinstein, D-CA)	6/16/2011: Bill Introduced 6/16/2011: Referred to Senate Committee on the Judiciary

Bill Number	***Bill Title***
S. 1408	Data Breach Notification Act of 2011
Sponsor	***Description***
Feinstein (D-CA)	This bill sets requirements for notice to consumers in the event of a security breach involving sensitive personally identifiable information (which is specifically defined in the bill to include a name and a combination of personally identifiable information). It includes exemptions for national security and law enforcement and contains a safe harbor if a covered entity conducts a risk assessment that finds there is no risk of harm to individuals and notifies the Secret Service of the results of the risk assessment. Enforcement is shared by the Attorney General and state attorneys general with civil penalties for violations up to $1,000,000 per violation.
Cosponsors	***History***
None	7/22/2011: Bill Introduced 7/22/2011: Referred to Senate Committee on the Judiciary 9/22/2011: Ordered to be reported with an amendment in the nature of a substitute favorably by Committee on the Judiciary 2/6/2012: Committee on the Judiciary. Reported by Senator Leahy with an amendment in the nature of a substitute. Without written report. Placed on Senate Legislative Calendar under General Orders. Calendar No. 310. Related bills: S.1151, S.1535

Bill Number	Bill Title
S. 1434	Data Security Act of 2011
Sponsor	***Description***
Carper (D-DE)	This bill requires entities that maintain sensitive account or personal information to establish policies and procedures to protect the confidentiality and security of sensitive account information and to establish requirements for notice in the event of a security breach. Enforcement is shared by various federal agencies with oversight of financial institutions. Does not allow a private right of action and preempts state laws in this area.
Cosponsors	***History***
1 (Blunt, R-MO)	7/28/2011: Bill Introduced 7/28/2011: Referred to Senate Committee on Banking, Housing and Urban Affairs

Bill Number	Bill Title
S. 1535	Personal Data Protection and Breach Accountability Act of 2011
Sponsor	***Description***
Blumenthal (D-CT)	This bill enhances the punishment for identity theft and concealment of security breaches involving sensitive personally identifiable information. It also requires covered entities to design and implement security policies to protect sensitive personally identifiable information. It establishes civil penalties up to $20,000,000 per violation. Enforcement authority is granted to state attorneys general and a private right of action for individuals is permitted, with damages per violation up to $20,000,000 plus punitive damages and equitable relief. It sets notice requirements in the event of a security breach (and contains a safe harbor if a risk assessment determines there is no risk to individuals as a result of the breach). It also allows consumers request credit monitoring and to place a security freeze on their credit report in the event of a breach.
Cosponsors	***History***
1 (Franken, D-MN)	9/8/2011: Bill Introduced 9/8/2011: Referred to the Senate Committee on the Judiciary 9/22/2011: Ordered to be reported with an amendment in the nature of a substitute favorably. Reported by Senator Leahy with an amendment in the nature of a substitute. Without written report. Placed on Senate Legislative Calendar under General Orders. Calendar No. 182. Related Bills: S.1151, S.1408

Bill Number	Bill Title
S. 2111	Cyber Crime Protection Security Act
Sponsor	***Description***
Leahy (D-VT)	This bill enhances the penalties for fraud, identity theft and other activity in connection with computers
Cosponsors	***History***
None	2/15/2012: Introduced in Senate. Read the first time. Placed on Senate legislative calendar under Read the First Time. 2/16/2012: Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 324. Related Bills: S.1151

Privacy Legislation in the 112th Congress: House of Representatives

Bill Number	Bill Title
H.R. 611	Building Effective Strategies to Promote Responsibility Accountability Choice Transparency Innovation Consumer Expectations and Safeguards Act (BEST PRACTICES Act)
Sponsor	***Description***
Rush (D-IL/1)	This bill would require entities that collect personal or sensitive information to give notice regarding the purposes for the collection, whether the information will be shared, and how persons can limit collection, use and disclosure of information. It requires opt-out consent for the collection and use of data by a covered entity and express affirmative consent for sharing with third parties. Entities are required to set up reasonable procedures to assure the accuracy of information it collects, including a dispute resolution process. It also requires entities to establish reasonable security procedures for data. It sets up a safe harbor for entities that participate in a self-regulatory (FTC approved) Choice Program which contains a clear and conspicuous opt-out mechanism and preference management tools. The bill is to be enforced by the FTC and state attorneys general and civil penalties can be assessed up to $5,000,000 per series of violations. It also contains a private right of action for consumers.
Cosponsors	***History***
None	2/10/2011: Bill Introduced 2/10/2011: Referred to House Committee on Energy and Commerce. 2/18/2011: Referred to Subcommittee on Commerce, Manufacturing and Trade.

Bill Number	Bill Title
H.R. 654	Do Not Track Me Online Act
Sponsor	***Description***
Speier (D-CA/12)	This bill requires the FTC to issue a rulemaking under 5 USC 553 to establish standards for an online opt-out mechanism that allows consumers to prevent the collection or use of information relating to their online activity and other personal information, such as name, address, email address, or government issued ID numbers or financial information. It requires the regulation to include requirements governing disclosure of the practices of the entity collecting the information. Enforcement authority is given to state attorneys general with civil penalties for liability up to $5,000,000.
Cosponsors	***History***
22	2/11/2011: Bill Introduced 2/11/2011: Referred to House Committee on Energy and Commerce. 2/18/2011: Referred to Subcommittee on Commerce, Manufacturing and Trade.

Bill Number	Bill Title
H.R. 1528	Consumer Privacy Protection Act of 2011
Sponsor	***Description***
Stearns (R-FL/6)	This bill covers all collection of personally identifiable information both online and offline. It requires companies to notify consumers that their personally identifiable information may be used or transferred for purposes unrelated to a transaction and requires privacy policy statements that are "brief, concise, clear and conspicuous

	and written in plain language" which are available to consumers prior to the collection of any personally identifiable information. It also requires companies to provide consumers with ability to opt out of the sale or disclosure of their personally identifiable information to third parties; that opt-out would be effective for five years unless the consumer indicates otherwise; consumers cannot be contacted about their opt-out by the company involved until at least one year has elapsed. It requires entities to set up a security policy designed to prevent the release of personal information. Finally, it sets up a process for the Federal Trade Commission (FTC) to approve self-regulatory programs for a period of five years; a company that participates in an approved self-regulatory program would not be liable for any civil penalties for violation of the act unless the noncompliance was willful; requires the FTC to presume that a company is in compliance with the act if it participates in an approved self-regulatory program. Enforcement is by the Federal Trade Commission (with fines up to $500,000) and private rights of action are prohibited.
Cosponsors	***History***
5 (lead co-sponsor is Matheson (D-UT/2)	4/13/2011: Bill Introduced 4/13/2011: Referred to the House Committee on Energy and Commerce. 4/25/2011: Referred to the Subcommittee on Commerce, Manufacturing, and Trade.

Bill Number	***Bill Title***
H.R. 1707	Data Accountability and Trust Act
Sponsor	***Description***
Rush (D-IL/1)	This bill requires the FTC to promulgate rules under 5 USC 553 that would require entities that collect and use personal information (or contract out to third parties to maintain consumer data) to establish policies and procedures relating to information security practices, which must be submitted for review to the FTC. Consumers must be permitted to access data on them at least one time per year at their request and must be provided a mechanism for disputing data. It also requires notice to consumers and to the FTC within 60 days in the event of a security breach. Enforcement is shared by the FTC and state attorneys general with civil penalties for violations up to $5,000,000. It also preempts state laws in this area.
Cosponsors	***History***
4	5/4/2011: Bill introduced 5/4/2011: Referred to the House Committee on Energy and Commerce. 5/6/2011: Referred to the Subcommittee on Commerce, Manufacturing, and Trade. Related Bill: S. 1207 (Pryor), H.R. 2577 (Bono Mack)

Bill Number	***Bill Title***
H.R. 1841	Data Accountability and Trust (DATA) Act of 2011
Sponsor	***Description***
Stearns (R-FL/6)	This bill requires the FTC to promulgate rules under 5 USC 553 that would require entities that collect and use personal information (or contract out to third parties to maintain consumer data) to establish policies and procedures relating to information security practices, which must be submitted for review to the FTC. Consumers must be permitted to access data on them at least one time per year at their request and must be provided a mechanism for disputing data. It also

	requires notice to consumers and to the FTC within 60 days in the event of a security breach and requires cable operators and providers who in the transmission of data become aware of a breach to report it to the entity that initiated the data transmission. Enforcement is shared by the FTC and state attorneys general with civil penalties for violations. It also preempts state laws in this area. This bill also sets requirements for the destruction of obsolete paper records containing personal information.
Cosponsors	***History***
1 (Matheson (D-UT/2)	5/11/2011: Bill introduced 5/11/2011: Referred to the House Committee on Energy and Commerce. 5/13/2011: Referred to the Subcommittee on Commerce, Manufacturing, and Trade. Related Bill: H.R. 2577 (Bono Mack)

Bill Number	***Bill Title***
H.R. 1895	Do Not Track Kids Act of 2011
Sponsor	***Description***
Markey (D-MA/7)	Revises the Children's Online Privacy Protection Act of 1998 to require online companies to explain the types of personal information collected, how that information is used and disclosed, and the policies for collection of personal information, and requires verifiable parental consent for the collection, use or disclosure of children's personally identifiable information. Parents must be given a report on data collected and used on children on their request and the right to refuse future collection. It prohibits online companies from using personal information from children for targeted marketing purposes. It also creates a "Digital Marketing Bill of Rights for Teens" that limits data collection and use of data from teens. It prohibits the collection of geolocation data from children and teens and requires the FTC to establish an "eraser button" that allows users to eliminate publicly available personal information on children and teens. Enforcement is shared between the FTC and state attorneys general.
Cosponsors	***History***
44 (lead cosponsor is Barton (R-TX/6)	5/11/2011: Bill introduced 5/11/2011: Referred to the House Committee on Energy and Commerce. 5/23/2011: Referred to the Subcommittee on Commerce, Manufacturing, and Trade.

Bill Number	***Bill Title***
H.R. 2168	Geolocational Privacy and Surveillance Act (GPS Act)
Sponsor	***Description***
Chaffetz (R-UT/3)	This bill prohibits the intentional interception, disclosure or use of data regarding the location of a wireless communications device. It contains exceptions for prior consent, data collected in the normal course of business and in emergency situations. It would prohibit individuals or law enforcement from using location data from electronic devices without a warrant. Violators face fines up to $10,000 and up to five years in prison.
Cosponsors	***History***
21	6/14/2011: Bill Introduced 6/14/2011: Referred to the Committee on the Judiciary, and in addition to the Committee on Intelligence (Permanent Select), for a period to be subsequently

	determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. 7/11/2011: Referred to the Subcommittee on Crime, Terrorism, and Homeland Security (Judiciary) 5/17/2012: Subcommittee Hearings Held. Related Bill: S. 1212 (Wyden)

Bill Number	***Bill Title***
H.R. 2577	Secure and Fortify Electronic Data Act (SAFE Data Act)
Sponsor	***Description***
Bono Mack (R-CA/45)	This bill requires the FTC to promulgate regulations under 5 USC 553 that require covered entities to establish policies to protect personal information. It also sets requirements for notice in the event of a security breach. Enforcement is shared by the FTC and state attorneys general. Civil penalties up to $5,000,000 can be assessed for violations.
Cosponsors	***History***
None	7/18/2011: Bill Introduced 7/18/2011: Referred to the House Committee on Energy and Commerce 7/29/2011: Referred to the Subcommittee on Commerce, Manufacturing and Trade. Related Bill: H.R. 1707 (Rush), H.R. 1841 (Stearns), S. 1207 (Pryor)

Media Content and Child Protection Legislation

A number of high profile incidents over the past few years have increased Congressional attention on both indecency and violent entertainment. In 2006, Congress passed legislation to increase indecency fines ten-fold to $325,000 per violation. In addition, some members of Congress have sought to limit violent programming by giving the Federal Communications Commission regulatory authority to ban it if measures such as the ratings system and v-chip are found to be ineffective.

ANA opposes any restrictions on violent programming that limit the First Amendment rights of broadcasters. We have also been instrumental in the creation of the Alliance for Family Entertainment, a proactive group of 45 major national advertisers. (See the Alliance for Family Entertainment section on the ANA web site).

Media Content and Child Protection Legislation in the 112th Congress: Senate

Media Content and Child Protection Legislation in the 112th Congress: House of Representatives

Bill Number	*Bill Title*
H.R. 400	To require certain warning labels to be placed on video games that are given certain ratings due to violent content.
Sponsor	*Description*
Baca (D-CA/43)	Requires the Consumer Product Safety Commission to issue regulations requiring a label reading "WARNING: Excessive exposure to violent video games and other violent media has been linked to aggressive behavior" be placed on every video game rated T (Teen) or higher by the Electronic Software Ratings Board.
Cosponsors	*History*
2 (lead cosponsor is Wolf (R-VA/10))	1/24/2011: Bill Introduced 1/24/2011: Referred to the House Committee on Energy and Commerce. 2/1/2011: Referred to the Subcommittee on Commerce, Manufacturing, and Trade.

Direct-to-Consumer Prescription Drug Advertising Legislation

Numerous surveys have shown that direct-to-consumer prescription drug advertising imparts important benefits to consumers. However, some in Congress want to limit this category of advertising, either through moratoriums or limitations on the tax deductibility of the cost of advertising. ANA has lobbied key Congressional committees in support of DTC pharmaceutical advertising, provided key witnesses for hearings and distributed economic research in support of DTC advertising to key members of Congress.

ANA supports prescription drug advertising and opposes any attempts to limit it. In this effort, ANA works with our member companies and industry groups such as the Pharmaceutical Research and Manufacturers Association (PhRMA) to protect the right of pharmaceutical manufacturers to communicate directly and effectively with consumers. We support PhRMA's Guiding Principles for Direct-to-Consumer Advertising, which can be viewed at http://www.phrma.org/direct_to_consumer_advertising/.

Direct-to-Consumer Prescription Drug Advertising Legislation in the 112th Congress: Senate

Bill Number	*Bill Title*
S. 3187	Food and Drug Administration Safety and Innovation Act
Sponsor	*Description*
Harkin (D-IA)	Section 1122 of this bill requires the FDA to issue a guidance within 2 years on Internet promotion and social media marketing of regulated medical products, including drugs.
Cosponsors	*History*
1 (Enzi, R-WY)	5/15/2012: Introduced in Senate. 5/24/2012: Passed Senate with amendments by yea-nay vote 96-1. 5/25/2012: Received in the House and Held at the desk. Related Bills: S.1151

Direct-to-Consumer Prescription Drug Advertising Legislation in the 112th Congress: House of Representatives

Bill Number	*Bill Title*
H.R. 722	Say No To Drug Ads Act
Sponsor	*Description*
Nadler (D-NY/8)	This bill would disallow the tax deduction for direct-to-consumer prescription drug ads.
Cosponsors	*History*
None	2/15/2011: Bill Introduced 2/15/2011: Referred to House Committee on Ways and Means

Bill Number	*Bill Title*
H.R. 2296	America Rx Act of 2011
Sponsor	*Description*
Michaud (D-ME/2)	This bill would deny manufacturers who do not participate in a rebate program for prescription drugs from deducting the cost of advertising expenses.
Cosponsors	*History*
3	6/22/2011: Bill Introduced 6/22/2011: Referred to House Committee on Energy and Commerce.

Bill Number	Bill Title
H.Res. 343	Expressing disapproval of the decision by the Supreme Court in Sorrell v. IMS Health Inc.
Sponsor	***Description***
Markey (D-MA/7)	A resolution to express the House of Representatives' disapproval with the majority opinion in Sorrell v. IMS because it 1) puts prescribers at risk of having their information sold without their knowledge or consent; 2) believes the Supreme Court incorrectly applied a 'heightened' First Amendment standard of review to an instance of commercial regulation; 3) believes the negative impact on a pharmaceutical manufacturer's ability to market their products is outweighed by the interests of patient safety, doctor privacy, and health care costs; and (4) believes that the States have the right to regulate the pharmaceutical industry based on what they believe is best for the health and safety of their residents.
Cosponsors	***History***
None	7/8/2011: Bill Introduced 7/8/2011: Referred to the Committee on Energy and Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. 8/25/2011: Referred to the Subcommittee on the Constitution of the House Judiciary Committee.

Obesity and Food Advertising Legislation

Obesity was identified in 2001 by the Surgeon General as the second leading cause of preventable death in the United States. In response, there have been a number of initiatives proposed in Congress to increase physical activity and improve nutrition, especially among young people. ANA is in favor of such legislation. Unfortunately, this has also led to attacks on the food industry's advertising and marketing of their products. ANA has been increasingly active in resisting any limitations on truthful, non-deceptive food advertising. Additionally, the Children's Advertising Review Unit (CARU) has undertaken a revision of its guidelines regarding children's advertising, which can be viewed at http://www.caru.org/guidelines/index.asp. The National Advertising Review Council has set up a Children's Food and Beverage Advertising Initiative, which includes 17 of the largest food advertisers, to ensure that advertising includes information about healthy food choices and healthy lifestyles. More information on the initiative can be viewed at http://www.cbbb.org/initiative/.

Obesity and Food Advertising Legislation in the 112th Congress: Senate

Bill Number	*Bill Title*
S. 174	Healthy Lifestyles and Prevention America Act (HeLP America Act)
Sponsor	*Description*
Harkin (D-IA)	This bill would provide resources for healthier foods and for physical activity programs in schools, provide tax benefits to employers to increase employee wellness and create a number of grant programs to provide funds to communities to develop community health programs. It also would restore FTC rulemaking authority over unfairness in advertising to children and would grant notice and comment (otherwise known as APA) rulemaking authority to the FTC. For more on this bill, please see the section on Tobacco Advertising Legislation.
Cosponsors	*History*
None	1/25/2011: Bill Introduced 1/25/2011: Referred to Senate Committee on Finance

Bill Number	*Bill Title*
S. 1573	Financial Services and General Government Appropriations Act, 2012
Sponsor	*Description*
Durbin (D-IL)	The committee report of this bill contains a provision encouraging the Interagency Working Group on Food Marketed to Children to thoroughly consider the comments it received in regard to the proposed voluntary marketing principles and to submit the principles in a final report to the committee by December 15, 2011.
Cosponsors	*History*
None	9/15/2011: Bill Introduced 9/15/2011: Original measure reported to senate by Senator Durbin. With written report no. 112-70. Placed on Senate Legislative Calendar under General Orders. Calendar No. 171. Related Bill: H.R. 2434 (see below for further action)

Obesity and Food Advertising Legislation in the 112th Congress: House of Representatives

Bill Number	***Bill Title***
H.R. 2434	Financial Services and General Government Appropriations Act, 2012
Sponsor	***Description***
Emerson (R-MO/8)	Sec. 631 of this bill prohibits the FTC from completing the draft report entitled 'Interagency Working Group on Food Marketed to Children: Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts' unless the Interagency Working Group on Food Marketed to Children complies with Executive Order 13563.
Cosponsors	***History***
None	7/7/2011: Bill introduced 7/7/2011: The House Committee on Appropriations reported an original measure, H. Rept. 112-136, by Mrs. Emerson. 7/7/2011: Placed on the Union Calendar, Calendar No. 86. Related Bill: S. 1573 This bill (including sec. 631) was consolidated into H.R. 2055 and passed the House 296-121 on 12/16/2011. It passed the Senate 67-32 on 12/17/2011, and was signed by the president on 12/23/2011.

Bill Number	***Bill Title***
H.R. 2795	Fit for Life Act of 2011
Sponsor	***Description***
Fudge (D-OH/11)	This bill would establish various grant programs to encourage healthy lifestyles, fitness programs, and increased nutrition. It would also establish a National Commission on Childhood Obesity to study childhood obesity and to advise on the need to evaluate existing laws and regulations related to the prevalence, prevention and treatment of childhood obesity.
Cosponsors	***History***
5	8/5/2011: Bill introduced 9/6/2011: Referred to the Committee on Energy and Commerce, and in addition to the Committees on Education and the Workforce, Ways and Means, Natural Resources, the Judiciary, Financial Services, and Agriculture, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

Alcohol Beverage Advertising Legislation

ANA monitors Congressional, regulatory and judicial activities impacting alcohol beverages. We actively lobby in opposition to legislative or regulatory proposals that would infringe on the right to carry out truthful and nondeceptive advertising of legal products directed to legal audiences. The Ad Council (http://www.adcouncil.org/) and the Century Council (http://www.centurycouncil.org/) also have carried out extensive public service advertising in regard to anti-alcohol abuse campaigns.

Alcohol Beverage Advertising Legislation in the 112th Congress: Senate

Bill Number	*Bill Title*
S. 854	Sober Truth on Preventing Underage Drinking Reauthorization Act (STOP Act)
Sponsor	*Description*
Lautenberg (D-NJ)	This bill amends the Public Health Service Act to require the Secretary of Health and Human Services to report on federal programs and policies designed to prevent and reduce underage drinking, including data on the exposure of underage populations to messages regarding alcohol in advertising and media.
Cosponsors	*History*
None	4/14/2011: Bill Introduced 4/14/2011: Referred to the Committee on Health, Education, Labor, and Pensions. Related Bill: H.R. 1562

Alcohol Beverage Advertising Legislation in the 112h Congress: House of Representatives

Bill Number	*Bill Title*
H.R. 1161	Community Alcohol Regulatory Effectiveness Act of 2011
Sponsor	*Description*
Chaffetz (R-UT/3)	This bill affirms that the states have primary authority over the regulation of alcoholic beverages and the dormant commerce clause is no bar to state regulation. States are prohibited from intentional or facial discrimination against out-of-state alcohol producers in favor of in-state producers, unless it can show the challenged law serves a legitimate governmental purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.
Cosponsors	*History*
122	3/17/2011: Bill Introduced 3/17/2011: Referred to the House Committee on the Judiciary. 6/1/2011: Referred to the Subcommittee on Courts, Commercial and Administrative Law.

Bill Number	*Bill Title*
H.R. 1562	Sober Truth on Preventing Underage Drinking Reauthorization Act (STOP Act)
Sponsor	*Description*
Roybal-Allard (D-CA/34)	This bill amends the Public Health Service Act to require the Secretary of Health and Human Services to report on federal programs and policies designed to prevent and reduce underage drinking, including data on the exposure of underage populations to messages regarding alcohol in advertising and media.
Cosponsors	*History*

6	4/14/2011: Bill Introduced 4/14/2011: Referred to House Committee on Energy and Commerce 4/25/2011: Referred to the Subcommittee on Health. Related Bill: S. 854

Tobacco Advertising Legislation

ANA opposes any attempts to restrict the advertising of tobacco products, which remain legal for those over the age of 18.

Tobacco Advertising Legislation in the 112th Congress: Senate

Bill Number	*Bill Title*
S. 174	Healthy Lifestyles and Prevention America Act (HeLP America Act)
Sponsor	***Description***
Harkin (D-IA)	This bill would disallow the deductibility as a business expense any sums expended for the advertising of tobacco products and funds a counter-advertising program. For more on this bill, please see the section on Obesity and Food Advertising Legislation.
Cosponsors	***History***
None	1/25/2011: Bill Introduced 1/25/2011: Referred to Senate Committee on Finance

Tobacco Advertising Legislation in the 112th Congress: House of Representatives

For-Profit College Legislation

Recently, for-profit colleges have come under scrutiny for their recruitment and marketing practices. These bills would prohibit the use of federal educational assistance funds for marketing and advertising.

For-Profit College Legislation: Senate

Bill Number	*Bill Title*
S. 2296	Protecting Financial Aid for Students and Taxpayers Act
Sponsor	*Description*
Hagan (D-NC)	This bill would prohibit institutions of higher education or postsecondary education from using revenue derived from federal education assistance funds for advertising and marketing activities.
Cosponsors	*History*
5 (Harkin, D-IA; Durbin, D-IL; Sanders, I-VT; Blumenthal, D-CT; Franken D-MN)	4/18/2012: Bill Introduced 4/18/2012: Referred to Committee on Health, Education, Labor and Pensions Related Bill: H.R. 4390 (Grijalva)

Bill Number	*Bill Title*
S. 3295	Making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies for the fiscal year ending September 30, 2013, and for other purposes.
Sponsor	*Description*
Harkin (D-IA)	Section 309 of this bill would prohibit institutions of higher education or other postsecondary education from using revenue derived from federal education assistance funds for advertising and promotional activities.
Cosponsors	*History*
None	6/14/2012: Committee on Appropriations reported original measure to Senate by Senator Harkin. With written report No. 112-176. 6/14/2012: Placed on Senate Legislative Calendar under General Orders. Calendar No. 428.

For-Profit College Legislation: House of Representatives

Bill Number	*Bill Title*
H.R. 4390	To amend the Higher Education Opportunity Act to restrict institutions of higher education from using revenues derived from Federal educational assistance funds for advertising, marketing, or recruiting purposes.
Sponsor	*Description*
Grijalva (D-AZ/7)	This bill would prohibit institutions of higher education or postsecondary education from using revenue derived from federal education assistance funds for advertising and marketing activities.
Cosponsors	*History*
6	4/18/2012: Bill Introduced 4/18/2012: Referred to the Committee on Education and the Workforce

	Related Bill: S.2296 (Hagan)

Key Pending and Recently Decided Court Cases

The First Amendment protections for commercial speech are the ultimate safety net for all advertisers. As an ever-widening range of advertising becomes controversial, the courts become an even more crucial battleground for advertisers. ANA has played an active role in almost every major commercial speech case over the past twenty years, through "friend-of-the-court" briefs or by supporting parties in critical lawsuits.

These efforts have been successful. In a number of recent cases, the U.S. Supreme Court has ratcheted up the level of First Amendment protection for commercial speech. In its decision in *Greater New Orleans Broadcasting Association v. United States,* 527 U.S. 173 (1999), the Supreme Court cited ANA's brief for its articulation of the position that truthful, non-misleading commercial speech should be protected by a strict scrutiny standard instead of the current *Central Hudson* test. While the Supreme Court has not yet gone that far, in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), a commercial speech case, Justice Sandra Day O'Connor wrote that "if the First Amendment means anything, it means that regulating speech must be a last – not first – resort." ANA continues its active efforts in the courts to protect the First Amendment rights of marketers to communicate with consumers.

Following is a summary of some important pending and recently decided advertising cases.

Currently Pending 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 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 contends 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 unconstitutionally restricting speech. 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 2010, 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, 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 read at http://www.ana.net/getfile/15753. In March 2012, the U.S. Court of Appeals for the 6th Circuit handed down a 2-1 decision, finding some of the FDA's new regulatory authority over the marketing of tobacco products to be constitutional. Specifically, the court ruled that the provisions for new graphic warning labels, as well as those banning sponsorships, were constitutional. Importantly, however, the Court struck down the provisions banning the use of colors or pictures in tobacco advertisements featured in media that have underage youth comprising 15% or more of their audiences. The ruling is available at http://www.ana.net/getfile/17386. The 6th Circuit denied a rehearing by the full court in May.

R.J. Reynolds Tobacco Company et al v. FDA
Five tobacco companies have sought an injunction and summary judgment against the FDA's promulgation of rules enacting the warning label provisions of the Family Smoking Prevention and Tobacco Control Act. In February 2012, the U.S. District Court for the District of Columbia granted the plaintiff's motion for summary judgment, finding that the warning labels violated the First Amendment to the U.S. Constitution. U.S. District Court Judge Richard Leon wrote that "the Government…may not force others…to serve as its unwilling mouthpiece" and that the rule was insufficiently tailored to meet the government's interest to warrant compelling speech in such a manner. The case is scheduled for oral argument in April at the U.S. Court of Appeals for the District of Columbia Circuit on the preliminary injunction issued against the warning labels in November.

FCC v. Fox Television Stations
In 2004, the Federal Communications Commission changed its policies regarding so-called "fleeting expletives," making any broadcast of an expletive, even inadvertent, a violation of its indecency rules. Up until this change, the FCC had followed the policy it adopted after the Supreme Court's landmark *Pacifica* ruling (the famous "seven dirty words" case), and issued fines against broadcasters only for repeated indecency violations. The FCC then proceeded to levy substantial fines against broadcasters that had aired live events where such fleeting expletives were used. However, the Second Circuit Court of Appeals overturned these fines and raised questions about the FCC's indecency actions as they relate to the First Amendment. The Commission appealed to the U.S. Supreme Court, and in a fractured 5-4 decision, it reversed the Second Circuit. However, the case was decided on other grounds and did not reach the First Amendment issues raised by the FCC's order. The Court instead remanded it back to the appeals court for consideration of those issues, which struck down the fleeting expletives policy again in July, finding them too vague to withstand First Amendment scrutiny. The FCC appealed to the full Second Circuit, which agreed with the panel decision in November 2010. If the Supreme Court ultimately hears the First Amendment issues, the resulting opinion could have significant ramifications for content control generally. The Court may consider proposals to regulate other types of content, including potential advertising restrictions. Justice John Paul Stevens, in a dissenting opinion, specifically alluded to certain ads as raising potential indecency issues. Justice Clarence Thomas, in a concurring opinion, questioned the continued constitutional viability of the Court's holdings in both *Red Lion* and *Pacifica* in light of technological advances. The Supreme Court heard the case again in January 2012.

Recently Decided and Other Important Cases

***IMS Health* cases**
Vermont, New Hampshire and Maine 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 on October 13, 2009, and upheld the lower court's decision in November 2010, finding the law violated the *Central Hudson* test. Vermont appealed to the U.S. Supreme Court, which agreed to take the case in January 2011, most likely due to the split between the First and Second Circuits. In a 6-3 decision on June 24, 2011, the U.S. Supreme Court agreed with the Second Circuit and found that the Vermont law violated the First Amendment (and effectively reversing the First Circuit). In doing so, it rejected the First Circuit's finding that it regulated conduct and not speech, with Justice Anthony Kennedy writing that "the creation and dissemination of information are speech within the meaning of the First Amendment. . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes." In doing so, the Court found that Vermont's restrictions on speech were subject to "heightened scrutiny" but found it unnecessary to decide whether to apply the traditional test for regulating commercial speech. It said the result would be the same whether it conducted a commercial speech inquiry or applied a stricter form of judicial scrutiny. The state's asserted purpose, in preventing doctors from receiving more effective pitches from marketers, did not justify a restriction on speech. This case sets a strong, positive precedent for marketers that wish to target their message to consumers.

Schwarzenegger v. Entertainment Merchants Association et al

California passed a law in 2005 that prohibited 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 oral arguments in the case on November 2, 2010.

ANA joined a "friend-of-the-court" brief filed in conjunction with various publishers and recording groups to the Supreme Court. The brief argued 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, which can be viewed at http://www.ana.net/getfile/15862, contended that the justifications California made for the law are not sufficient to withstand Constitutional scrutiny.

On June 27, 2011, in one of the last decisions released in the 2010 term, the Court held 7-2 that the law violated the First Amendment. Justice Antonin Scalia, writing for the court, held that the state's responsibility to protect children from harm "does not include a free-floating power to restrict the ideas to which children may be exposed. . . Even where the protection of children is the object, the constitutional limits on governmental action apply." In his opinion, Justice Scalia discussed many of same examples from art and literature throughout history that our friend-of-the-court brief cited.

Educational Media Co. v. Swecker

The Fourth Circuit Court of Appeals recently reversed a lower court ruling in this case dealing with Virginia's ban on alcohol beverage ads in college newspapers. The court, in a 2-1 decision, held that the law did not violate the First Amendment. Using the test articulated in the U.S. Supreme Court's landmark *Central Hudson* case, the court held that the law materially advanced the government's interest in decreasing demand for alcohol among college students and preventing underage drinking. It also found that the law was sufficiently narrow in that it was limited to certain types of ads for beer, wine and mixed beverages and applied only to student-run publications targeted at a readership under 21 years old.

The college newspapers asked the U.S. Supreme Court to hear the case. ANA, along with the 4A's and AAF, submitted an amicus brief asking the court to grant cert. Our brief can be viewed at http://www.ana.net/getfile/15868. However, despite a split between this court and a decision issued by Judge (now Supreme Court Justice) Samuel Alito while on the Third Circuit Court of Appeals in 2004, which found a similar law in Pennsylvania violated the First Amendment, the U.S. Supreme Court declined to hear the case.

If you have any questions about the status or importance of any of these cases, please contact Daniel L. Jaffe in ANA's Washington, D.C. office at (202) 296-1883 or djaffe@ana.net.