Leading the Marketing Community

Living Beyond the Edge – A Report from Washington, DC

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Good morning and welcome to our version of "March madness."

The trash talk and elbows have begun to fly, not just on the basketball courts, but also in the Congress and at the White House.

I would like to take the next few minutes to talk about the most important issues facing the ad community right now. In my view, those issues are:

1) ICANN
2) Privacy
3) Ad Taxes
4) Food Advertising
5) Violence in media
6) The tobacco advertising cases

Internet Governance Issues

One of the most critical issues facing the business community and the marketplace in general is Internet governance. The Internet is a media and a venue for business that has radically transformed societies throughout the globe. It may be the most important information and marketing innovation development since the invention of the printing press. The Internet provides valuable information to consumers around the world at little or no cost. It has opened world-wide competitive markets by creating a low barrier to entry for entrepreneurs.

The online media has developed at an extraordinary pace. It took 38 years for radio to reach 50 million Americans. Network television took 13 years and cable TV took 10 years. It took only about three years for the Internet to reach 50 million users in the U.S. It is critical to remember that the growth of the Internet has been built primarily on the economic foundation of advertising and marketing.

In a 2012 report, the Boston Consulting Group provided some perspective on the growth and potential of the Internet economy:

- There are 2.2 billion Internet users now and by 2016, there will be 3 billion Internet users globally, almost half of the world's population.
- The Internet economy will soon reach $4.2 trillion in the G-20 economies. If it were a national economy, the Internet economy would rank in the world's top five, behind only the U.S., China, Japan and India and ahead of Germany.

These are truly incredible numbers. In many ways, the development of the Internet has out-raced the existing regulatory structures as we have known them. We have created an amazing international marketplace but we have not yet figured out exactly how to manage or regulate it.

This issue of Internet governance is being debated and played out in several different contexts, including copyright protections, consumer privacy protections and the plan by ICANN to greatly expand the universe of top-level domain names.

As a result, one of the most fundamental issues facing the ad community and the business community at large is over who should oversee and control the Internet. Should it be government regulation or industry self-regulation or some combination of the two?

During the SOPA/PIPA debates in Congress over Internet piracy, we heard the rallying cry of "Don't Break the Internet."

Whatever your views on those issues, not breaking the Internet should be a fundamental worldwide goal. As we address these complex issues, it is critical that we move cautiously and thoughtfully so we do not do anything to undermine this incredible online marketplace that has revolutionized the world.

ICANN's TLD Program

For almost two years, ANA has been leading the charge to shine a spotlight on the serious problems we see with the plans of ICANN to dramatically, and in our view precipitously, increase the number of Top Level Domains (TLDs). Within the current limited universe of 22 generic TLDs, there already is multi-billions of dollars of cybercrime such as phishing, cybersquatting, typosquatting, and counterfeiting of products. That's not just the opinion of ANA or the marketing community – U.S. and international consumer protection and law enforcement groups share that view and have expressed those concerns to ICANN.

The Internet community is on the verge of a potential TLD tsunami which will create a huge wave of risk for both consumers and brandowners. We have tried to work both the inside and outside game, to convince ICANN that major reforms must be put in place before the rollout of more than a thousand new TLDs begins. We have attended ICANN board meetings around the world and worked to focus attention from the Congress, the FTC and the Department of

Commerce on these critical issues. Unfortunately, the serious concerns of most of the brandowner community have too often fallen on deaf ears with the ICANN board.

There are far too many unresolved issues and too many important protections not yet in place, but ICANN plans to proceed full-speed-ahead to meet a totally arbitrary, self-imposed deadline with the rollout next month. We believe that decision creates grave threats to the security and stability of the Internet, two of the pillars of the Affirmation of Commitments that ICANN is contractually required to meet.

Some of these changes could prove useful by allowing TLDs in the languages of groups not able to receive information in their own languages. But most of these new TLDs will be for generic words or terms like .BANK, .INC, .INSURANCE or for specific brand names or categories of goods and services. Where multiple groups are competing for the same domain name, there can eventually be auctions that can drive costs into the multi-millions of dollars.

Many of these new proposed TLDs appear to be set up to create pressure for defensive registrations like: .WTF, .GRIPE, .SUCKS, .RIP, .SEX, and the like. The recent rollout of .XXX saw hundreds of thousands of defensive registrations at the second level. A number of these new names also appear to be ripe for cybersquatting dangers, such as .CHEAP, .DISCOUNT, and .FREE.

Recently, we have learned that ICANN's own efforts regarding new gTLD strings appear to have produced highly disturbing results. It is our understanding that ICANN hired a panel to review almost 2,000 new TLD strings to determine if some of them were confusingly similar; if so, they might be combined in the same contention set, so as to avoid Internet users being confused due to their similarity. They identified 230 "exact match contention sets" where multiple applicants sought the exact same string. They found just two "non-exact match contention sets:" "unicom" and "unicorm" and "hoteis" and "hotels."

ICANN's results were published, and astonishingly it appears that ICANN has found that the singular and plural version of words would not be confusingly similar. ICANN does not seem to think, for example, that, "coupon" and "coupons," "game" and "games," "home" and "homes," "hotel" and "hotels" or "car" and "cars" are confusing terms. While many applicants may be pleased to avoid having to contend with their competitors regarding singular and plural forms of names, the results for consumers and brandholders will be far from pleasurable. In fact, the results will be very harmful, and it is unbelievable that ICANN could have reached this decision. This will clearly only add enormously to defensive registration costs for brandholders.

There was a recent comment period for a so called Strawman Proposal, as well as a Limited Preventative Registration Mechanism (LPR) in new TLDs. The Strawman Proposal was a weak deal that would have cost brands significant amounts of money for a limited amount of effective protection. The Strawman did not include the LPR, which would allow trademark owners to prevent the registration of the exact matches of their trademarks, as well as commonly registered strings shown to have been used abusively in the past. The LPR

registration would require a reasonable fee and have appropriate safeguards for registrants with legitimate rights or interests across multiple domains.

Many major entities and national and international associations commented in favor of the LPR. However, there does not seem to be much evidence that ICANN will adopt this approach, and certainly not in time to meet the rollout launch which approaches at breakneck speed. Proposals like this need to be implemented, including a clear WHOIS verification database requirement, and adequate Uniform Rapid Suspension (URS) enforcement. The WHOIS database is intended to provide a clear record of the owners of websites, but it has traditionally been plagued with incompleteness and inaccuracies (with names registered to Santa Claus, Mickey Mouse, Donald Duck and God).

These types of travesties must be stopped. Accurate verification of who owns a domain is an essential law enforcement tool and a key part of ensuring the security of the funding of the Internet.

The URS is a new rights protection mechanism for new gTLDs. When a trademark owner files a URS complaint, the registry is supposed to immediately freeze the domain. However, those domains violating trademark rights will not be transferred over to the rightful trademark owner. A candidate to run the URS has finally stepped forward, which is a positive development, but the critical operating procedures for this key protective mechanism have not yet been finalized.

The bottom line is that ICANN does not have adequate safeguards in place to protect either brandowners or consumers. Clearly, the date for the rollout of new TLDs should be determined by the adequacy of the protections in place, rather than self-imposed deadlines that are unrelated to ICANN's readiness to launch. It seems that much of the decision-making within ICANN has been driven by dollars, rather than common sense.

We plan to keep a spotlight on this issue because the cost and risk to advertisers is certain to run into the billions of dollars. Industry needs to be prepared to defend itself across a number of new TLDs and against what will likely be a rash of new attempts by criminal elements to cybersquat and defraud consumers under the guise of legitimate brands.

We will hear much more about this issue tomorrow. Fadi Chehade, the President and CEO of ICANN, will be our luncheon speaker. We will also have a panel with three experts in this area who have helped lead the charge on behalf of brandowners.

Allowing trust in the Internet to be undermined would be a disaster for all of us.

The Privacy Debate

Consumer privacy is another arena where Internet governance issues are still being hotly debated. How do we assure that consumers feel safe enough to provide the information needed to transact business? Will privacy be protected by self-regulation, by government regulation or some combination of both? There is an EU initiative to treat an IP address on the Internet as personally identifiable information requiring opt-in permission for collection. Will privacy protection be based on a state or national or international model such as the European approach?

We will hear from two important policymakers in this area. Doug Gansler is the Attorney General of Maryland and the current President of the National Association of Attorneys General (NAAG). He has made consumer privacy a key initiative of his leadership term. Tomorrow we will hear from FTC Commissioner Julie Brill, who has played a very active role in the privacy agenda at the Federal Trade Commission.

Here is the challenge we face: how do we maintain and foster the extraordinary growth of the Internet and mobile marketplace with its tremendously positive impacts on the economy for both consumers and businesses—without endangering deeply held concerns about individual privacy and autonomy? How we answer that challenge has fundamental implications for both consumers and marketers.

There are legitimate privacy concerns by the public and the government from hacking, misuse of locational data, and other data that can cause harm, such as health information or financial data in the wrong hands. But those types of threats need to be distinguished from online behavioral advertising (OBA), which uses anonymized data to serve up relevant ads to consumers.

OBA is a critical tool for marketers to reach the right consumer at the right time with the right message. It provides enormous economic efficiency to the Internet marketplace; provides tremendous competitive benefits; and provides consumers with relevant marketing information rather than spam. However, some consumers and policymakers believe that even anonymous interest-based advertising raises privacy concerns. In 2007, the FTC released its first set of OBA guidelines and called for strong industry self-regulation.

To meet this challenge, we have put together one of the most rapidly growing self-regulatory programs in recent history—the Digital Advertising Alliance (DAA). ANA and four other industry groups were founding members of this alliance. Our program has an icon that alerts consumers to the fact that they have been served an ad based on OBA. From this icon, consumers can access information about OBA and are able to exercise the choice to opt out of further targeted ads from participating companies. Since the roll-out of the self-regulatory program for OBA in October 2010, 117 companies have signed on to the program. More than 18.5 million unique visitors have come to www.aboutads.info and www.youradchoices.com and more than one million consumers have opted out of OBA.

Our self-regulatory system is enforced by the DMA and ASRC, and already we have 19 cases that have been adjudicated. We have expanded our system to the EU and will also be expanding it to Canada. We will soon be expanding the program to the mobile arena as well.

Despite our efforts, we continue to face serious challenges.

Numerous bills have been proposed at the federal and state levels seeking to establish a Do Not Track regime. Senator Jay Rockefeller (D-WV), the Chairman of the Senate Commerce Committee, just introduced his bill a couple of weeks ago. ANA's President, Bob Liodice, testified on behalf of the DAA at a Commerce Committee hearing on privacy issues last summer. At that hearing, Chairman Rockefeller stated that industry self-regulation can never work and that industry cannot be trusted to regulate itself in this critical area. So we expect him to make a strong push for a government-imposed Do Not Track regime.

We are also facing what the cartoonist Walt Kelly's character "Pogo" once famously said: "We have met the enemy and it is us." We are beginning to see an internal division between the vast majority of the business community and some browser companies on these issues. Microsoft has put forward a Do Not Track header to be turned on by default in Internet Explorer 10 and has begun to extend this program to earlier Internet Explorer versions. Mozilla has recently stated they will be applying a patch that will not allow placement of any third party cookies.

Both of these decisions are wrong for consumers, for marketers and for the integrity of the Internet ecosystem. We have pushed back strongly against these efforts of the browsers. We recently met with Microsoft to express our belief that they are making the wrong choice for consumers. We are working to see if we can find common ground to protect the legitimate interests of both consumers and businesses.

If Mozilla proceeds with their plans, consumers will be herded into a new browsing environment where Mozilla makes the choices for them. Blocking third party cookies by default sends the false message to consumers that OBA is inherently bad without providing any information about the benefits of receiving relevant ads.

Our DAA program is based on the premise that consumers should be making the choice about whether they will receive interest-based ads, not the government and certainly not the browsers or any other business entity.

Their efforts threaten to take the information out of the information economy.

It is data that fuels the engine of the online marketplace. The actions of Microsoft and Mozilla would seriously undermine the effectiveness of online advertising and thereby damage the online experience for consumers. This would hurt competition and undermine American innovation and leadership in the Internet economy.

So what do we do in the face of these challenges?

We intend to demonstrate that our program is the best end-to-end program to maximize consumer choice and provide consumer benefits.

Do Not Track headers are not programs—but slogans. The claim that "this is what consumers want" is spurious. "Do Not Track" has no clear meaning, so consumers cannot make a meaningful choice. Many believe that they will see fewer ads. On the contrary, they will see more un-targeted ads, which essentially are little more than SPAM to those not interested.

We need to expand the program to mobile platforms, which we will do shortly.

We will roll out an information campaign to demonstrate the fundamental importance of OBA to startup companies and to show how targeted advertising promotes economic efficiency.

We will refocus on issues of harm that can flow from big data by working with industry on greater data security, encryption, and anonymization.

Most importantly, we will try to get more companies and agencies involved in the DAA process, as a self-regulatory program inherently has more teeth and credibility as it trends toward being the universal, international norm.

Federal Ad Taxes

Ad taxes are a bottom-line issue for all marketers.

Ad taxes, seen at both the state and federal levels, are two variations on the same theme. At the federal level, tax issues have become a major dividing line between Republicans and Democrats. In addition, tax issues in recent years have caused fractionalization between members of the Tea Party and certain other Republican groups.

The new factor in this Congress is that deadlock leads not to a status quo, but instead to major consequences, including billions of dollars in cuts and a potential shutdown of the federal government. The Congress has placed multiple Swords of Damocles over their own heads. The sequester, which was supposed to be so bad that Congress would never allow it to happen, officially kicked in on March 1st. $85 billion in cuts for the first year and even larger cuts every year for the next 9 years will have consequences not yet fully predictable.

The current Continuing Resolution (CR) funding the government is set to expire on March 27th. That CR contains certain provisions affecting food advertising. The House has passed an extension of the CR to the end of the fiscal year. The White House and the leadership in the Senate have both expressed the desire to avoid a government shutdown, so there are positive signals that a final CR will be worked out to fund government through the end of September.

At the same time, the budget process for FY2014 is just beginning and there are serious storm clouds on the horizon. Republicans in the House and Democrats in the Senate released their respective budget proposals last week. Both sides expressed hope for a grand bargain that includes a budget for next year plus some "fix" to reduce the impact of the sequester that began on March 1st.

However, the Republicans and Democrats are engaged in a long-running blame game, and it is a game with real world consequences. On one side are Speaker Boehner and House Republicans, who say that the President got all of the new revenue he will get on January 1st, when Congress eliminated the "Bush tax cuts" for higher income people. To paraphrase that great political strategist, Taylor Swift, Republicans will "never, ever, ever" raise taxes. On the other side are Senate Democrats, who believe the new revenue Republicans agreed to on New Year's Day was just a down payment. Their budget plan calls for raising nearly $1 trillion in new taxes over the next ten years.

One thing both parties have agreed upon is that they want to pass major tax reform. The President mentioned it last month in his State of the Union speech. Speaker John Boehner recently reserved the first bill number, HR 1, for a yet to be introduced tax reform package. Several weeks ago, the Chairman and Ranking Democrat on the House Ways and Means Committee, the tax-writing committee, announced eleven separate working groups to take a top-to-bottom look at the entire tax code.

Tax reform will be a highly volatile process, especially where activity concerning the closing of "tax loopholes" occurs. The question becomes, "What is a loophole, and who decides?" This is where ad taxes have the greatest threat of being dragged into the mix. Tax reform can become a free-for-all with various industries fighting to protect their interests. Former Louisiana Senator Russell Long was Chairman of the Senate Finance Committee for many years. He described tax reform debates as: "Don't tax you, don't tax me, tax the man behind the tree."

Advertising spending has been an ordinary and necessary deduction in the tax code since 1913.

Three types of proposals have been floated in the past:

1. Tax disallowance for a major group of expenses
2. Amortization proposals—typically 20% over 5 years
3. Disallowance for deductibility of advertisements for controversial categories such as tobacco, alcohol, violent video games, and more recently, fatty foods and direct-to-consumer prescription drugs.

In response, the ad community has published the IHS Global Insight Study, based on an economic model developed by Nobel Laureate in Economics Lawrence Klein. It breaks down the economic impacts of advertising by state and congressional district. It shows that on an

annual basis, advertising generates $5.8 trillion of economic output and supports 19.8 million jobs. Those are large numbers, even by Washington, DC standards.

We are currently in the process of carrying out additional studies in particularly targeted leadership states with a more granular look at key industries in those areas.

ANA and other marketing and media groups came together several years ago to form The Advertising Coalition (TAC) to fight these ad tax battles. That coalition holds "grass roots" meetings with key members of Congress on the tax-writing committees. The meetings include marketers and local media companies who can describe the importance of the advertising industry to their local economy and why it is critical to preserve the current tax laws. The Global Insight report is a powerful tool in these meetings. We have already held a number of these grass roots meetings and would be very happy to have your companies join us in states or districts where you have substantial operations or employees.

We need your support to fight off these ad tax proposals, which could cost the ad community billions of dollars in increased tax bills.

State Ad Taxes

The states are a different situation. Unlike the federal government, every state except Vermont is required by their constitution to have a balanced budget. So a dollar spent in one place means a dollar must be raised or removed somewhere else.

A number of governors are moving to cut personal and corporate income tax rates. Additionally, they propose cutting the sales tax rates, while simultaneously expanding their coverage to a number of previously exempted areas, including a number of services, such as advertising.

At the moment we are facing major challenges of this nature in Minnesota and Ohio. The governors of both states have proposed lowering the sales tax rate, while expanding it to cover a number of services, including advertising. And these are bipartisan threats, with Minnesota governed by a Democrat, Mark Dayton, and Ohio governed by a Republican, John Kasich. There are also rumors of similar forthcoming proposals in Michigan and Arizona.

The best way to fight these types of proposals is through coalitions and targeted outreach. Minnesotans will listen more closely to a General Mills or a Target or 3M, and Ohioans will pay more attention to a Wendy's, Procter and Gamble, Nationwide or the many other companies who are headquartered or have major installations there.

We are working closely with our members and allied industry groups in both states to oppose these bills. There are positive signs in both states. Minnesota Governor Dayton told a local Chamber of Commerce group on March 8th that he was backing away from the new sales tax on

B2B services. We have helped develop the Ohio Advertising Tax Coalition, which has a website (www.noadtax.com) and is meeting with members of the tax and budget committees.

Using numbers from the IHS Global Insights study, we have data that shows the negative impact of imposing the sales tax on advertising in each state. Applying the 5.5% sales tax rate to all advertising in Ohio would result in a loss of 47,363 advertising related jobs and a loss of $12.1 billion in ad-stimulated sales. Applying the 6.88% sales tax rate to all advertising in Minnesota would result in a loss of 31,490 advertising related jobs and a loss of $8.3 billion in ad-stimulated sales. It would clearly be counterproductive for these states to tax advertising.

Last Thursday, Louisiana Governor Bobby Jindal released his tax reform plan to legislators. It would eliminate the income tax, raise the sales tax rate from 4% to 5.88% and extend the sales tax to a number of services, including advertising agency services. The Governor's press release stated that the new tax would not apply to the purchase of advertising time and space. The legislative session in Louisiana begins on April 8th and we will work with members and other industry groups to oppose this proposal.

Food Advertising

Our industry has been engaged in a major food fight for the past several years. In 2011, we succeeded in defeating a major Interagency Working Group (IWG) proposal that would have significantly reined in the advertising of a vast array of food and beverage products to those under 18 because those products failed to meet incredibly restrictive and unprecedented nutrition guidelines. In fact, of the 100 most consumed foods in America, 88 would not have met the criteria.

The IWG proposal greatly expanded the definition of advertising to children. Our self-regulatory program and the FTC have traditionally focused on ads directed to children age 12 or younger; the IWG proposal expanded the focus to anyone under age 18. Never before has the federal government proposed treating teenagers the same way they treat young children.

We were able to get language inserted into the 2011 Appropriations bills and later into the Continuing Resolutions, stating that a final version of the IWG report could not be issued without a cost/benefit analysis consistent with the Executive Order of President Obama. These restrictions will sunset with the end of the CR on March 27th unless they are reactivated.

We could see a re-emergence of this effort. In addition, Congresswoman Jo Ann Emerson, whose efforts were largely responsible for getting this language inserted into the Appropriations bills, has recently retired from Congress to become President of the National Rural Electric Cooperative Association. The First Lady also has made obesity her focus, suggesting that policymakers are almost certain to remain focused on it as well.

In my view, this issue will continue to be significant until obesity rates substantially decrease.

Nevertheless, there have been some positive developments. A recent FTC report reviewing the ad activity of 48 major companies complimented self-regulatory efforts in the food area, saying that from 2006 to 2009, spending on ads to children dropped by 19.5 percent. A few studies have found some positive developments in regard to the rates of obesity. For example, one study showed a decrease of 13.3% in the obesity levels in Mississippi, which has one of the highest obesity rates in the country.

But there are also significant negative developments. A number of articles in major newspapers and segments on TV shows have focused attention on critics of food advertising.

Just recently on MSNBC's "Morning Joe," Michael Moss, a *New York Times* investigative reporter, was a guest and discussed his new book *Salt Fat Sugar: How The Food Giants Hooked Us*. He alleged that food is as an addictive substance and that the advertising of food is directly responsible for food addiction and obesity. Moss and other commentators argued that food companies have deliberately targeted those in society most vulnerable to obesity. Moss stated: "The best experts on food addiction will tell you that for many people, these highly loaded products, especially with sugar and fat, are every bit as addictive as some narcotics. And those people are advised to stay away."

The host of the program, former Congressman Joe Scarborough, concluded: "There's science to this. They spend millions of dollars figuring out how to hook people."

They are not alone in their criticisms. Melanie Warner has recently published a book called *Pandora's Lunchbox: How Processed Food Took Over the American Meal,* in which she criticizes the growth of processed foods.

Mark Bittman has also been a vocal critic over the years, and in a February 27th *NY Times* op-ed, entitled "It's the Sugar, Folks," he claimed that sugar was directly linked to diabetes as conclusively as tobacco is linked to lung cancer: "[A]ccording to this study, it's not just obesity that can cause diabetes: sugar can cause it, too, irrespective of obesity . . . The study demonstrates this with the same level of confidence that linked cigarettes and lung cancer in the 1960s."

The bottom line is that as long as childhood obesity remains a serious problem, there will be a critical focus and governmental regulatory and legislative challenge to food advertising.

Media Violence

One other area that is certain to be dragged into the political maelstrom is violence in video games, movies, TV programs, and in the ads.

In the aftermath of the tragedy in Newtown, the NRA and others have blamed the culture of violence for igniting susceptible individuals to commit violent acts. Last December, Wayne La Pierre, the Executive Vice President of the NRA, stated: "There exists in this country, sadly, a callous, corrupt and corrupting shadow industry that sells and sows violence against its own people through vicious and violent video games."

Last week, during a discussion of potential gun control measures, Congressman Frank Wolf (R-VA), the Chairman of the House Appropriations Subcommittee on Commerce, Justice and Science, lashed out at violent video games and said that action against the video game industry is necessary in order to reduce violence in our society.

Senator Rockefeller has also focused on this issue and has called for a study by the National Academy of Science. Up until now, this issue has been handled by labeling of programs and movies for their content and allowing parents to block TV access.

The violence area and the impact of media and advertising violence have received substantial study, which have had divergent conclusions. Some have shown levels of violence decreasing in society in recent years, while others have said that violence in media changes behavior. In the past, former Senator Joe Lieberman said that the claim that violence in media does not lead to violence in society is virtually the same as claiming that there is no connection between tobacco and cancer. He said that you can't put up a sign saying "stream polluted," but must instead clean up the stream.

We never oppose reasonable studies, but we need to assure the results of studies are not pre-determined by stacking the deck of researchers.

This is one of numerous examples of efforts by policymakers to "childproof" commercial speech. In *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729 (2011), the Supreme Court invalidated a California law that prohibited the sale or rental of violent video games to minors under age 18. Justice Scalia, writing for the majority, wrote 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." ANA submitted an *amicus* brief to the Supreme Court in this case.

Pending Court Cases

There are two tobacco advertising cases pending in the federal courts that could have major implications for all marketers.

The Family Smoking Prevention and Tobacco Control Act of 2009 contains the most burdensome marketing restrictions ever passed by Congress for a legal product. A lawsuit challenging the marketing restrictions was filed by six major tobacco companies in the U.S.

District Court for the Western District of Kentucky. In a 2010 decision, that court held that the Tobacco Control Act's ban on colors and images in ads was unconstitutional. However, the court upheld other speech restrictions including broad bans on sports, cultural, and other sponsorships and a requirement of new graphic warnings.

On appeal, the U.S. Court of Appeals for the Sixth Circuit upheld certain of the advertising restrictions in a March 2012 decision. *Discount Tobacco City & Lottery v. United States of America,* 674 F.3d 509 (6th Cir.2012). A group of tobacco companies has asked the Supreme Court to review and reverse that decision. We filed an *amicus* brief with both the District Court and the Court of Appeals and another last November, urging the Supreme Court to accept the appeal.

ANA has also been very active in a separate lawsuit challenging one part of the Tobacco Control Act, the graphic warnings Rule which was implemented by the FDA in 2011. The U.S. Court of Appeals for the District of Columbia came to a very different conclusion from the Sixth Circuit on the First Amendment defects with the Act. On August 24th, that court vacated the FDA's graphic warnings Rule, concluding that it would turn product packages and ads into miniature billboards for the government's desired messages. *R.J. Reynolds Tobacco Company et al v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

These two cases are intertwined and at constitutional odds. As a result of several briefing delays, it seems unlikely that the Supreme Court will grant *cert* and hear the appeal during the current term. We are very hopeful that the Court will ultimately accept this appeal, join the two cases and overturn the portions of these decisions unreasonably restricting advertising.

The outcome of this case will determine not just whether tobacco companies can be compelled to vilify their own products, but the extent to which ads for other products and services can be forced to carry the government's message. While the government can require ads to disclose certain factual and noncontroversial information, the warnings in the FDA's graphic warnings rule go far beyond what the First Amendment allows.

In addition, there are two important developments that raise issues about how new media, blogs and disclosure requirements are effecting advertising regulation.

First, a recent decision by the Virginia Supreme Court may provide the U.S. Supreme Court with the opportunity to examine the boundary between commercial and non-commercial speech, an important area the Court avoided in the *Nike* case in 2003. In *Hunter v. Virginia State Bar*, 2013 WL 749494 (Va. 2013), announced on February 28th, the Virginia court held that a lawyer's blog was commercial speech and could only be published with an advertising disclaimer compliant with Virginia's rules, alerting the public that the material is advertising. Mr. Hunter plans to file a Petition for Certiorari in the U.S. Supreme Court, arguing that his blogs are political speech, not commercial speech, and therefore the state bar may not impose an advertising disclaimer. We will be following this case very closely and have already been asked to file an *amicus* brief.

Last week, the FTC released the new "Dot Com Disclosures" guidance. It re-emphasizes that consumer protection laws apply equally to marketers across all mediums, whether ads are delivered on a desktop computer, on a mobile device, or through traditional electronic or print media. The new guides, which were first issued in 2000, contain examples and mock ads to inform marketers on how to provide clear and conspicuous disclosures in close proximity to relevant claims on all platforms, including social media and mobile marketing. ANA and the Direct Marketing Association (DMA) provided comments to the Commission last August on these issues. The Commission stated that certain hyperlinked disclosures should be avoided. It will be important to see how the Commission will deal with ads that require extensive disclosures in the new media environment.

Conclusion

Our industry clearly faces very serious threats impacting an unprecedented range of issues. We continue to be confronted by an extremely hostile and challenging political environment. These facts make it more important than ever for advertising lawyers to ensure that their companies and agencies are meeting all of the current legal and regulatory requirements that continue to proliferate.

We also need to continue to build, strengthen, and adhere to the mandates of our self-regulatory programs. Effective self-regulation is the critical means by which industry can demonstrate responsibility, thus obviating the need for overly restrictive regulation by the government.

We need your help to respond to these various threats. It is critical that members of Congress hear from you and your company's lobbyists about how these proposals would affect your businesses. The ad community can determine its own fate in regard to these issues, but only if it acts in a forceful, unified, and proactive manner.

There have been two bottom-line lessons I have learned over the years.

First, most of the policy threats we face are bipartisan. It does not make a whole lot of difference which party controls the White House or the Congress. We have critics from across the political spectrum, from conservative Republicans to liberal Democrats.

Second, we are most effective in responding to these threats when the entire marketing eco-system works together. Advertisers, agencies, media companies all must work together to protect our industry. As Benjamin Franklin put it so well many years ago, "We must all hang together or surely we will hang separately."