

2001 Compendium of Legislative, Regulatory, and Legal Issues

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Introduction

2001 proved to be a period of major activity for advertising issues in Washington. ANA actively responded and achieved a number of important successes. These successes include:

1. A major victory in the Supreme Court in the *Lorillard* case which struck down restrictions on outdoor advertising and strengthened the First Amendment protection of advertising. ANA also successfully participated in important lower court cases and a challenge of the Children's Online Protection Act (COPA) before the Supreme Court in *Ashcroft v. ACLU*;
2. The launch of the Privacy Leadership Initiative (PLI). PLI is a coalition of major advertisers and associations working together on key privacy issues. This year the PLI developed and published several key economic studies on the value of information transfer between consumers and business that have contributed a positive influence to the policy debate in Washington. ANA is on the executive and steering committees of PLI;
3. The development of strategies and the fostering of economic and other research in support of Direct-to-Consumer (DTC) prescription drug advertising. ANA also carried out systematic meetings with a broad range of leaders in the House and the Senate in regard to this critical issue;
4. A successful effort to oppose onerous restrictions on marketing and information collection practices in the schools. The ANA worked with members of Congress and other industry groups to help pass reasonable legislation to protect student privacy;
5. The launch of a tracking system of legislative, regulatory, and legal issues affecting advertising;
6. The development and distribution of a major First Amendment analysis by constitutional expert Robert Corn-Revere concerning legislation directed to restricting advertising for broad categories of music, movies and video game; and
7. The defeat of major advertising tax initiatives in several states.

ANA will continue to work actively on a broad range of issues to protect the interests of the advertising community, including: state and federal ad taxes, privacy, pharmaceutical advertising, marketing in schools, media content, tobacco advertising, international advertising policy, obesity issues, alcohol beverage advertising, and SAG/AFTRA and musician union issues.

While the Congressional schedule was sharply restricted following the terrorist attacks of September 11th, we expect Congress to resume a normal work schedule in the coming

months. At that time, key issues affecting advertising, including pharmaceutical advertising, privacy, and tax issues, will rise to the top of the agenda.

ANA will continue to track these key issues and post updates on the new Legislative, Regulatory and Legal Tracking System found on the Government Relations section of our website at www.ana.net. This tracking system was launched in 2001 as a service to our members. If you are aware of additional advertising legislation, regulation or court cases that should be added to the tracking system, please contact the Washington, D.C. office at washington@ana.net or (202) 296-1883.

Finally, we published an advocacy document, *The Role of Advertising in America*, which describes the importance of advertising to businesses, consumers and the economy. This publication has been very useful in educating policymakers about the role that advertising plays in our country.

New Legislative and Regulatory Environment

The election of President George W. Bush and the shift in party control in the United States Senate in 2001 presented the advertising community with a new legislative and regulatory environment.

The 107th Congress

Republicans maintained control of the U.S. House of Representatives as a result of the 2000 election. For the first time since 1881, the U.S. Senate was evenly split between Republicans and Democrats. While the election of Vice President Richard Cheney gave the Republicans a one-vote majority status, the two parties worked out an unprecedented power-sharing arrangement. Republicans were chairs of all committees, but there were equal numbers of Republicans and Democrats on each committee and equal funding for staff.

This unique power-sharing arrangement was dissolved in May when Vermont Senator James Jeffords formally left the Republican Party and became an Independent and control of the Senate shifted to the Democrats. Mississippi Senator Trent Lott became the Minority Leader and South Dakota Senator Tom Daschle became the new Majority Leader.

The shift in party control brought about two important changes for the advertising community. Senator Fritz Hollings (D-SC) took over the Chairmanship of the Senate Commerce Committee from Senator John McCain (R-AZ). Senator Hollings has taken a more activist position on media content issues and online privacy issues. Senator Joe Lieberman (D-CT) assumed the Chairmanship of the Senate Government Affairs Committee, which has broad oversight jurisdiction over operations of the federal government. Senator Lieberman has been very active on media content issues.

The terrorist attacks of September 11th and the anthrax letters received on Capitol Hill in October shifted the focus of the 107th Congress away from most domestic issues. However, issues impacting advertising are highly likely to take center stage in the new Congress.

New Regulatory Focus

The election of President George W. Bush brought new leadership for the Federal Trade Commission (FTC) and almost a complete turnover on the Federal Communications Commission (FCC).

Timothy Muris was appointed as the new Chairman of the FTC, replacing Robert Pitofsky. Muris has considerable experience in marketing and antitrust issues. In the 1980's, he served as Director of the FTC's Bureau of Consumer Protection and the

Bureau of Competition. ANA has met with Chairman Muris to discuss privacy issues and other issues of concern to the advertising community.

The President designated Michael Powell as the Chairman of the FCC. Chairman Powell, a member of the Commission since 1997, has previously spoken at several ANA functions. President Bush has appointed three new members to the Commission: Kathleen Abernathy, Michael Copps and Kevin Martin. There is currently one vacancy on the FCC.

Advertising Tax Deductibility

Background

While there have been numerous legislative attempts to reduce or eliminate advertising tax deductibility, ANA continues to fight for full deductibility of advertising expenses. Through the Advertising Tax Coalition (ATC), a group of nine advertising and media associations, ANA continues to monitor developments and meet with key members and their staff on the tax-writing committees.

Status

ANA and the ATC continued to meet in 2001 with members of the Congressional tax-writing committees. The continuing high rate of turnover in Congress and on the House Ways and Means and Senate Finance Committees requires ANA to meet with new members of these committees to ensure that they understand the value of advertising to the economy.

Throughout 2001, ANA has focused its attention on opposing renewed efforts to limit the tax deductibility of prescription drug advertising. ANA continues to inform members of Congress of the value of Direct-to-Consumer prescription drug advertising and why it would be inappropriate to eliminate or limit the deduction for this increasingly important category of advertising.

Also, due to the economic downturn and the aftermath of the September 11th terrorist attacks, the budget situation has dramatically changed from a projected period of surplus to a deficit scenario. In the past, when the Congress has faced the need to combat deficits while trying to develop major new legislative and regulatory initiatives, across-the-board ad tax deductibility limitation proposals always have surfaced and received active consideration.

Next Steps

Congress will continue to debate prescription drug costs and prescription drug benefits under Medicare in 2002. It is critically important that the advertising industry's voice is heard and that we play a major role in this debate. As always, we will continue to work aggressively as well on general ad tax issues.

State Advertising Tax Deductibility

Background

ANA is a founding member of the State Advertising Coalition (SAC), which opposes efforts to tax advertising at the state and local level. Since 1987, we have worked with member companies and allied trade groups to turn back more than 100 advertising tax proposals in 40 states.

Status

There were serious advertising tax battles in Minnesota, Nebraska and Tennessee in 2001. ANA worked closely with local media and advertising groups to defeat each of these proposals.

For the second consecutive year, **Tennessee** did not approve an addition of any new taxes to the state budget. The legislature in Tennessee debated for months whether to adopt a state income tax or expand the business services covered by the sales tax, including advertising. The Senate reached an initial budget agreement, including the use of \$560 million in tobacco settlement funds, but this proposal was vetoed by Governor Don Sundquist. Legislators overrode the Governor's veto and established a one-year stop-gap solution until 2002 when the tax structure issue is certain to be raised again.

Minnesota continues to consider tax reform plans. However, the state legislature did not pass Governor Jesse Ventura's proposal to include a sales tax on all advertising services, including the purchase of media time and space. Governor Ventura's proposal would have extended the sales tax to cover most business and professional services even though a budget surplus was expected. ANA worked closely during the budget process with the Minnesota Communications Coalition, an organization of advertising and media groups.

Senator Kermit Brashear (R) introduced legislation (LB841) to broaden the **Nebraska** sales tax to cover a broad range of services, including advertising agency services. The Revenue Committee held a hearing on this legislation in February and LB841 did not pass. ANA submitted testimony in opposition to this proposal.

ANA's Position

Advertising accounts for over 2% of GDP and is important to the economy of the nation and individual states. Efforts by state and local governments to tax the advertising process will negatively impact consumers, local media and the local economy.

Next Steps

ANA anticipates serious battles in several state legislatures in 2002 to tax advertising and other business services. A number of states were already facing fiscal problems even before the terrorist attacks of September 11th. As a result of the fallout of those attacks and the downturn in the national economy, as many as forty states now face some level of budget strain. Florida, Minnesota and Tennessee are faced with shortfalls of more than \$1 billion each. John McKay, the President of the Florida Senate, already has revealed his plans for a state sales tax referendum that would include advertising. ANA will continue to work with member companies and allied industry groups to oppose state advertising taxes.

Privacy Issues

Background

Consumer privacy issues received considerable attention in Congress and at the Federal Trade Commission (FTC) in 2001. Taking a leadership role over the past several years, the ANA has encouraged strong industry self-regulation and the development of technological tools to empower consumers to protect their privacy in the online marketplace. Many policymakers are now focusing on information collection practices in the offline marketplace as well as the online environment.

Status

Congressional Activity: A number of privacy bills have been introduced in the 107th Congress. Several would impose an opt-in regime for all information collection and give consumers a private right of action to sue for privacy violations. Others would require websites to post a privacy policy and give consumers the ability to opt out of information sharing.

The Subcommittee on Commerce, Trade and Consumer Protection of the House Energy and Commerce Committee held a series of six hearings on privacy issues. The Senate Commerce Committee also held a hearing on these issues. ANA submitted testimony to the House subcommittee, arguing that any restrictions on information sharing in the marketplace should be subjected to a rigorous cost/benefit analysis.

In October, two key leaders in the House of Representatives announced that they were developing baseline privacy legislation to be introduced in 2002. The announcement was made by House Energy and Commerce Committee Chairman Billy Tauzin (R-LA) and Consumer Protection Subcommittee Chairman Cliff Stearns (R-FL).

The draft Stearns/Tauzin proposal would apply to all information collection practices, both online and offline. It would require all commercial websites to post privacy policies and provide consumers with the ability to opt-out of information transfers to third parties. It would preempt state laws on information privacy and preclude any private right of action. The proposal would also create an enforcement “safe harbor” for companies that comply with self-regulatory organizations that have been certified by the FTC.

While we support industry self-regulation and enforcement of existing laws as the best approach to general privacy regulation, ANA has provided input to Chairman Stearns and his staff on the draft proposal.

Federal Trade Commission Activity: The FTC also has been very active in this area. In March, the Commission held a public workshop on consumer profiling. ANA worked with other industry groups to develop testimony on the benefits of information sharing in

the marketplace. ANA also worked with the new FTC Chairman Timothy Muris and Bureau of Consumer Protection Director Howard Beales.

In October, Chairman Muris announced a major new privacy initiative and stated that the Commission would not seek new legislation in the privacy area. This was a major shift in FTC policy. Under former Chairman Robert Pitofsky, the Commission had called for new legislation. Chairman Muris stated that the Commission would enhance the enforcement of existing laws, such as the Fair Credit Reporting Act, the Telemarketing Sales Rule and the Children's Online Privacy Protection Act. He announced that the agency's resources committed to consumer privacy protection would be increased by 50%.

In December, the FTC and seven other federal agencies sponsored a public workshop on how financial companies can most effectively comply with the privacy notice requirements of the Gramm-Leach-Bliley Act.

ANA's Position

ANA does not believe that sweeping new federal privacy legislation is necessary. We commend Chairman Muris for his recently announced privacy agenda, including new resources, more consumer outreach and education and new enforcement initiatives. No government or combination of governments has the resources to police all of cyberspace effectively. Vigorous enforcement of the FTC Act, COPPA, the Gramm-Leach-Bliley Act and other existing privacy laws, combined with the various efforts of the private sector, can provide consumers with the best protection of their privacy in our new economy.

ANA is a founding member of the Privacy Leadership Initiative (PLI). PLI was formed in 2000 by the CEOs of 30 major companies and associations with the vision to give consumers control over their privacy by saying how and when their personal information can be used. ANA Executive Vice President Dan Jaffe serves on the PLI Executive Committee and is co-chair of the Research Committee. ANA Senior Vice President Barbara Bacci Mirque chairs the Communications Committee.

PLI carried out a wide range of privacy initiatives and had two major accomplishments in 2001. First, we released several important, ground breaking economic studies on the value of information transfer and the potential costs of government regulation. For several industry sectors, including financial services and catalog sales of apparel, the studies demonstrate the multi-billion dollar annual savings for consumers from the ability of companies to collect and transfer personal information. Those studies are available at the PLI website, www.understandingprivacy.org.

In addition, PLI and the Interactive Advertising Bureau (IAB) launched a major new initiative aimed at educating consumers on how to protect their privacy. The cornerstone of the effort is an online advertising campaign valued at more than \$13 million. The

campaign is expected to generate more than 538 million impressions over the next year and reach 70% of all Internet users. This is the largest consumer education campaign about privacy ever launched by the business community. Efforts are underway to extend this campaign to other media.

Next Steps

Consumer privacy issues will continue to receive considerable attention in Congress and at the FTC. We expect Representatives Tauzin and Stearns to introduce their major privacy legislation early in 2002. Legislation on privacy is also expected to be introduced by key leaders in the Senate.

ANA will continue to oppose unreasonable legislation that would choke off the valuable flow of information in our economy. We will continue our efforts through PLI to encourage more consumer education and stronger industry self-regulation.

Children's Online Privacy

Background

Recognizing that the privacy of children in the online environment presents a special case, ANA and other industry groups worked closely with Congress to pass the Children's Online Privacy Protection Act of 1998 (COPPA). That legislation requires websites directed at children under 13 to post a privacy notice and to obtain parental consent before collecting, using and disclosing personally identifiable information from children.

We also worked closely with the Federal Trade Commission on the rule to implement COPPA. The FTC's Rule, adopted in October of 1999, requires that commercial websites directed to children under age 13 obtain verifiable consent from a parent or guardian before they collect personal information from a child.

In order to allow time for the development of reliable electronic methods of verification, the Rule adopted a sliding scale approach for obtaining parental consent, based on the reason for collecting the personal information. If a website is collecting personal information solely for its internal use and is not disclosing the information to third parties, the Rule allows the website to obtain parental consent through the use of an e-mail message from the parent, coupled with additional steps to assure that the person providing the consent is the parent.

By contrast, if a website is going to disclose personal information to the public or third parties, the site must use more extensive methods to obtain parental consent, such as a print-and-send form to be mailed back, use of a credit card, or an e-mail accompanied by a PIN number or password. This sliding scale approach to obtaining parental consent is set to expire on April 21, 2002.

Status

The FTC has proposed a two-year extension of the sliding scale approach for obtaining verifiable parental consent under COPPA. When it issued the final Rule, the Commission anticipated that more reliable methods of obtaining verifiable parental consent would soon be widely available and affordable. In proposing the two-year extension of the sliding scale approach, the FTC stated that "it appears that the expected progress in available technology has not yet occurred."

ANA's Position

ANA and several other industry groups filed comments with the FTC on November 30th, urging the Commission to extend the sliding scale approach for a period of ten years. We argued that companies are reluctant to develop systems of e-mail consent that could be

phased out in two years. A longer extension of the sliding scale approach would provide more regulatory certainty and more incentive for the development of the technologies that both industry and the Commission want to encourage.

Next Steps

The FTC has not announced a decision on the proposed two-year extension of the sliding scale approach. ANA will continue to work with policymakers and industry groups to encourage the development of technologies that will protect children in the online world without destroying the interactive benefits of that environment.

School Marketing

Background

In the past few years, marketing to students and the collection of information from students in the schools have received considerable attention in Congress. ANA worked with members of Congress and other industry groups in 2001 to help pass reasonable legislation that protects the privacy of students without imposing onerous restrictions on information collection in the schools.

Status

Senators Chris Dodd (D-CT) and Richard Shelby (R-AL) introduced legislation (S. 290, “The Student Privacy Protection Act”) that would have imposed a sweeping new privacy regime that went farther than any other area of federal privacy law. Under their bill, schools would be required to get prior written permission (opt-in) from parents before disclosing any information, even anonymous or aggregate information, to marketers. Schools that did not get prior written consent could lose federal funding.

ANA was among the first to sound a vigorous alarm to the business community in opposition to the Dodd-Shelby amendment. In addition to its impact on school-based ads and marketing, the amendment would have set an extremely harmful precedent for other privacy legislation that may be considered by Congress.

A version of the Dodd-Shelby bill was added to the Senate’s major education reform bill. ANA worked closely with key members of Congress and other industry groups to develop an alternative to the Dodd-Shelby amendment. The final version of the student privacy legislation that was passed by the Congress in December is a major improvement over the original proposal of Senators Dodd and Shelby. It directs local school districts to adopt policies on the collection and use of information from students. Schools will be required to provide parents with an annual notice of this privacy policy and parents will have the ability to opt out of participating in activities involving information collection.

The final version of the education bill will give parents the ability to protect the privacy of their children without establishing a massive new federal privacy regime or undermining local control of education policy.

Next Steps

Some members of Congress believe that the compromise legislation that was adopted in 2001 does not go far enough to protect student privacy. Some state legislatures may also consider restrictions on marketing or information collection in the schools. ANA will continue to closely monitor this area to oppose unreasonable restrictions on the relationships between schools and the business community.

Key Court Cases

Background

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 fifteen years, through “friend-of-the-court” briefs or by supporting parties in critical lawsuits.

ANA has been working systematically to strengthen and clarify the protection afforded advertising under the First Amendment. 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.

Status

Lorillard Tobacco Company v. Thomas Reilly, Attorney General of Massachusetts

The entire advertising community won a major victory in the U.S. Supreme Court on June 28, 2001 in the *Lorillard* case. The Supreme Court held that a regulation promulgated by the Massachusetts Attorney General that imposed a ban on most outdoor and point-of-sale advertising for tobacco products violated the First Amendment and was preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). ANA had filed a “friend-of-the-court” brief in February, urging the Court to strike down the sweeping regulation. Our brief cited numerous examples of speech about products and services that would be at risk if government were allowed to “childproof” advertising in our society.

The precedents solidified in the *Lorillard* case already have had a positive impact on several cases pending in the lower courts.

Greater New York Metropolitan Food Council v. Giuliani

Several supermarket and advertising associations (including ANA) filed a lawsuit challenging a New York City ordinance that banned outdoor advertising for tobacco products within 1,000 feet of schools, playgrounds, day care centers and other youth centers. Noted First Amendment attorney Floyd Abrams represented the industry groups in this lawsuit. The district court found that the ad ban was preempted by the FCLAA, but the Court of Appeals reversed. After the Supreme Court’s decision in *Lorillard*, the district court ruled that the ordinance was invalid and the City of New York does not plan to challenge that decision.

Federation of Advertising Industry Representatives (FAIR) v. City of Chicago

A coalition of industry groups filed a lawsuit in 1997 challenging the constitutionality of a Chicago ordinance which banned most outdoor advertising for tobacco and alcohol beverage products. A federal district court held that the ordinance was invalid, but that decision was reversed by the Seventh Circuit Court of Appeals. The city council reviewed the ordinance in light of the *Lorillard* case and revoked these restrictions in October.

Utah Licensed Beverage Association v. Leavitt

On July 24th, the U.S. Court of Appeals for the 10th Circuit ruled that Utah's laws which prohibit advertising of wine and liquor should not be enforced. Citing the *Lorillard* case, the court held that because there is a strong probability that the Utah law violates the First Amendment, the ad bans should not be enforced while the lawsuit is pending.

Eller Media Company v. City of Cleveland

In 1999, Eller Media Company challenged a Cleveland ordinance that prohibited most outdoor advertising for alcohol beverage products. A federal district court ruled that the ordinance was invalid. An appeal from that decision is pending. ANA is filing a friend-of-the-court brief in this case. The case is particularly important, as the Cleveland City Council has carried out a more detailed defense than usual in an effort to justify their restrictions.

Korean-American Grocers Association v. City of Los Angeles

In August 1999, nine trade associations challenged the city ordinance banning all "publicly visible" outdoor advertising for alcohol beverage products. The plaintiffs' motion for a temporary injunction on enforcement was granted. Currently, both sides are carrying out discovery. ANA is a member of the coalition providing support for the challenge to the ban.

Eller Media Company v. City of Oakland

A lawsuit was filed challenging a city ordinance banning all off-premise outdoor advertising for alcohol beverage advertising. Before the Supreme Court issued its decision in *Lorillard*, the ordinance was upheld at the trial court level and the plaintiff chose not to appeal that decision.

Ashcroft v. ACLU

This is a very important commercial speech case that is now pending before the U.S. Supreme Court, involving a challenge to the Child Online Protection Act (COPA). COPA was passed by Congress in 1998 to impose civil and criminal penalties on commercial speech on the Internet that is "harmful to minors." COPA was a follow-up to the Communications Decency Act (CDA), which was declared unconstitutional in a unanimous decision of the U.S. Supreme Court in *ACLU v. Reno*, 521 U.S. 844 (1997).

The U.S. Court of Appeals for the Third Circuit held that the criminal provisions of COPA violate the First Amendment by suppressing a large amount of commercial speech

on the Internet that adults are entitled to communicate and receive. The Attorney General has appealed that ruling to the Supreme Court.

ANA filed a “friend-of-the-court” brief in the CDA case and we filed another *amicus* brief on September 20th in the *Ashcroft* case. Our brief was prepared by Steven Brody, a constitutional expert at the law firm of King & Spalding. COPA specifically singles out online commercial speech for regulation that does not apply to speech for non-commercial purposes. Our brief urges the Court to make clear that the government may not treat commercial enterprises as if they were second-class citizens under the First Amendment.

Children deserve to be protected from harmful or inappropriate material, but over twenty years ago in the *Bolger* case, the Supreme Court stated that efforts to restrict advertising cannot lower discourse in society “to the level of the sandbox.” That is precisely what would happen if the government were permitted, under COPA, to attempt to childproof all commercial speech on the Internet.

Prescription Drug Advertising

Background

ANA with other allied groups fought hard for the modernization of DTC advertising rules. Since the FDA modernized its approach to DTC advertising in regard to broadcast advertising, ad expenditures have grown from approximately \$600 million in 1996 to more than \$2.5 billion in 2001. However, the debate over increasing health care costs has once again focused attention by legislators and advocacy groups on direct-to-consumer (DTC) prescription drug advertising. ANA has strongly advocated, and continues to support, the right of pharmaceutical manufacturers to advertise directly to consumers. In addition, ANA believes that consumers want truthful, non-deceptive information about prescription drugs to enable them to play a more active role in their health care decisions.

Status

Prior to September 11th, Congress was focusing increased attention on health care cost escalation. Both the Senate and House Commerce Committees held hearings in 2001 on prescription drug advertising. ANA submitted testimony at each of these hearings. Also, Representative Pete Stark (D-CA) has introduced legislation to deny the tax deduction for advertised prescription drugs unless there is a “fair balance” of information in the ads. House Ways and Means Committee Chairman Bill Thomas (R-CA) also has been reported to be concerned about the potential impact of advertising of prescription drug costs. We expect that when Congress returns to a relatively normal work schedule in 2002, a spotlight will be turned once again on health care costs and DTC advertising.

ANA’s Position

In addition to advocating the value of prescription drug advertising to key members of Congress, their staffs, the Food and Drug Administration, the Federal Trade Commission, and the news media, ANA is distributing key research to policy makers to support the advertising industry’s position.

ANA was successful in our efforts to urge the Senate Commerce Committee to invite American Enterprise Institute Resident Scholar, John E. Calfee to be a witness at their hearing on prescription drug advertising. Calfee released a white paper in May that reviewed a number of DTC pharmaceutical studies, which demonstrated the value of DTC advertising to consumers and their positive response to this advertising. This white paper was produced for the Coalition for Health Care Communications. ANA is one of the ten members of this coalition.

In addition, ANA provided research by Professor Frank Lichtenberg of the Columbia University Graduate School of Business to key committees and staff members. Professor Lichtenberg’s study demonstrates the value of prescription drugs to patients and the health care economy. Professor Lichtenberg’s research found that for “every \$1 increase

in prescription drug expenditures, there is a corresponding savings of \$3.65 in hospital care expenditures”. ANA’s presentation to Congress pointed out how DTC advertising helps the general public learn about new medications and in particular provides assistance to underserved and disadvantaged audiences.

Next Steps

We will continue to develop and distribute major research and advocate the value of DTC advertising to policy makers and the news media in preparation for anticipated Congressional activity in the new Congress.

Media Content and Child Protection

Background

For the past three years, the Senate Commerce Committee has passed legislation directed at protecting children from the content of violent movies, video games, music, and the Internet. However, the full Senate has yet to pass these bills. In 2001, advocacy groups and key members of Congress have continued to focus attention on media content.

Status

The Federal Trade Commission (FTC) also released a report in 2001 as a follow-up to its 2000 report examining the marketing practices of the entertainment industry. Overall, the FTC found an improvement among the motion picture and electronic game industries. However, the FTC stated that the music industry did not show the same improvement failing to sufficiently reduce the amount of inappropriate entertainment advertisements in popular teen media. The industry, the FTC claimed, continued to place ads for albums containing explicit lyrics in popular teen venues. The FTC did not call for any new legislation raising the issue of constitutionality but emphasized the importance of self-regulation.

Senator Joseph Lieberman (D-CT) felt the movie and television industries had made progress with self-regulation of advertising for movies in “restoring the credibility of their ratings systems and the trust of parents”. As a result, Senator Lieberman stated that he would not push action on his *Media Marketing Accountability Act* for the time being.

Senator Sam Brownback (R-KS) urged the FTC to continue monitoring the entertainment industry’s marketing practices to make sure progress continues. However, Senator Brownback stated that he was extremely disturbed with the recording industry. He argued that “the music industry continues to make a killing off marketing violence to kids. This is irresponsible and wrong. They owe America’s parents an apology.” House Commerce Committee Chairman Billy Tauzin (R-LA) also focused on what he viewed as the recording industry’s irresponsibility in his comments on the FTC report. He stated that “the lack of any real progress by the industry is very troubling and leaves the committee with no choice but to review all of its oversight options”.

The Parents Television Council (PTC) also conducted its fifth annual study analyzing the media content during the “family hour” from 8 p.m. to 9 p.m. The study, “The Sour Family Hour: 8 to 9 Goes from Bad to Worse”, found that objectionable content was present 8.41 times during each of the 200 hours measured, and that coarse language was up 78%. As a result, the PTC pledged to target advertisers who support “objectionable” material during the “family hour”.

ANA's Position

ANA continues to object to any legislation that would attempt to restrict the legitimate First Amendment rights of the entertainment industry in the advertising arena. The FTC's follow-up report explicitly states concerns about the constitutionality of federal legislation in this area. Federal legislation that could ban or overly restrict such material would set precedents that could foster restrictions on other areas of advertising and marketing. For these reasons, ANA advocates self-regulation and parental education as the best means to monitor the violent or sexual content of video games, movies, music and the Internet.

ANA also provides support for The Family Friendly Programming Forum, which is a coalition of 45 major national advertisers who work proactively to increase the number of family friendly programming choices on television. For more information on The Family Friendly Programming Forum, please go to ANA's website at www.ana.net.

Media Content and Child Protection: Legislative Activities

The Lieberman Bill

Senator Joseph Lieberman (D-CT) introduced the *Media Marketing Accountability Act of 2001* (S.792) giving the FTC regulatory authority over activities that are considered unfair or deceptive practices. These activities would include intentionally advertising or marketing to minors or marketing to an audience with a large portion of minors. The legislation includes a "safe harbor" provision if the marketer abides by self-regulatory activities. Representative Steven Israel (D-NY) introduced an identical bill (H.R. 2246).

Senator Hillary Rodham Clinton (D-NY) is an original co-sponsor of S.792. Senator Clinton stated in a press release supporting the Lieberman language that parents cannot rely solely on self-regulation of the entertainment industry to protect children. When speaking of the *Media Marketing Accountability Act*, Senator Clinton said, "This legislation would establish common sense rules that would let parents rest assured that their children are not being targeted through deceptive advertising practices." In response to the FTC report, Senator Clinton also called for a single rating system for music, video games and movies.

ANA's Position

ANA opposes legislation that unreasonably restricts the flow of information. We asked constitutional expert Robert Corn-Revere to analyze the legislation. Mr. Corn-Revere's analysis of the *Media Marketing Accountability Act of 2001* found the measure to be unconstitutional and to violate the First Amendment by controlling commercial and noncommercial speech. He stated in his report that the legislation penalizes even those who self-regulate and provide educational material to parents about protecting their

children. ANA submitted the Corn-Revere analysis at the Senate Government Affairs Committee hearing on this issue.

The Brownback Bill

Senator Sam Brownback (R-KS) introduced the *Children's Protection Act of 2001*, S.124, which establishes a voluntary code of conduct with the entertainment companies allowing them to create standards to stop marketing violence to children. The legislation exempts industry agreements which include voluntary guidelines on television programming, video games, movies, Internet content, music lyrics containing violence, sexual content, criminal behavior or other harmful influences on children from antitrust laws. However, the antitrust exemptions do not apply to the sale or purchase of advertising. Senator Brownback is likely to continue to press for action on this legislation in 2002.

The Hollings Bill

Senator Ernest Hollings (D-SC) reintroduced legislation, the *Children's Protection from Violent Programming Act*, S.341, directing the Federal Communications Commission (FCC) to evaluate the v-chip and content ratings and establish whether children are being protected from violence using these methods. The bill requires the FCC to enforce a "safe harbor" to block violent programming at times when children are a substantial part of the audience if the v-chip and TV ratings do not prevent children from viewing such programming. It also requires the FCC to establish guidelines to evaluate programs for violence and define the hours for the "safe harbor". Congressman Ronnie Shows (D-MS) introduced an identical version, H.R. 1005, to the House of Representatives.

ANA's Position

ANA favors support of parental judgment and control by informing them through voluntary ratings and empowering them with technologies such as the v-chip. ANA believes that the Hollings legislation implementing safe harbors would ban an enormous amount of protected speech and would violate the First Amendment. The legislation in effect would empower the government to arbitrarily ban broad categories of programming containing any type of violence.

Food Advertising

Background

Studies have shown that adult and childhood obesity is rapidly increasing. In recent years, the food industry has been under attack by advocacy groups who often point to food advertising as one of the major factors in increased rates of obesity in the United States.

Status

The Center for Science in the Public Interest (CSPI) has particularly focused on the soft drink industry, describing soft drinks as “liquid candy”.

Legislative and regulatory action also has been taken to control the amount of soft drinks and snacks students get from the school system through vending machines or school lunches. The U.S. Department of Agriculture proposed a plan requiring schools to sell only those foods that meet federal nutrition standards including snack foods and soft drinks. Senator Patrick Leahy (D-VT) proposed “*The Better Nutrition for School Children Act of 2001*”. The Act bans the sale or distribution of non-nutritional foods to students on school property during meal times and authorizes the Agriculture Secretary to study whether this restriction should be in effect before lunch periods. In addition, Maryland Senator Paul Pinsky (D-Prince George’s) introduced legislation that prohibits schools to sell soft drinks or non-nutritious snacks before 3 p.m.

More recently, the U.S. Department of Health and Human Services released a report, *The Surgeon General’s Call to Action To Prevent and Decrease Overweight and Obesity*, recognizing “overweight and obesity as a major public health problem”. The report was based on statistics showing that 61% of adults, 13% of children ages 6-11, and 14% of adolescents ages 12-19 were overweight or obese in 1999. The report states that the number of adolescents that are overweight or obese has almost tripled in the past two decades.

ANA’s Position

While obesity is a major health concern, ANA opposes legislative and regulatory actions that would restrict the food industry’s commercial speech rights. Working with ANA food industry members, ANA supports the Surgeon’s General’s proposals to combat obesity through better education and community outreach, increased physical education programs in the schools and increased physical education and nutrition information for the general public.

Tobacco Advertising

Background

Efforts continue to grant jurisdiction over tobacco product advertising to the Food and Drug Administration (FDA). A Supreme Court decision invalidated the Clinton administration's efforts to have the FDA regulate tobacco products and advertising. The Court held that the Congress had not provided this authority to the Agency. Subsequently, legislation has been introduced in both Houses of the Congress to grant this authority to the FDA.

Status

Despite the unsuccessful attempts in the past to grant the FDA authority to regulate the advertising of tobacco products, new legislation continues to be advocated in Congress. Representative Henry Waxman's (D-CA) *FDA Tobacco Jurisdiction Act of 2001* and Representative Greg Ganske's (R-IA) *FDA Tobacco Authority Amendments Act* both grant the FDA authority to regulate the advertising and marketing of tobacco products. Other legislation, including Senator Bill Frist's (R-TN) *National Youth Smoking Reduction Act* and Representative Tom Davis' (R-VA) *National Youth Smoking Reduction Act*, authorizes the Secretary of Health and Human Services to regulate the advertising, sale and distribution of tobacco products. While ANA has no views on the regulation of tobacco products themselves, we continue to meet with key committee members in Congress and their staffs to oppose FDA jurisdiction over tobacco advertising.

ANA's Position

ANA continues to direct its efforts toward supporting FTC jurisdiction over tobacco advertising because the FDA does not have the expertise to regulate this type of consumer advertising. The FTC, on the other hand, has broad experience in regulating in this area. Granting the FDA jurisdiction over tobacco advertising would set a dangerous precedent that might lead the FDA to seek control of other product advertising such as alcohol beverage and food advertising.

Next Steps

ANA will continue its efforts in the Congress and the courts to defend the right to truthfully and nondeceptively advertise tobacco products. The legislative, regulatory and judicial precedents in this area have impacts far beyond the tobacco industry.

Alcohol Beverage Advertising

Background

Alcohol beverage advertising continues to face scrutiny in the Congress, the courts and federal regulatory agencies. ANA has taken the lead in opposing product-specific threats to advertising and protecting the First Amendment rights of alcohol beverage companies.

Status

FTC and BATF Petitions

In May, the Center for Science in the Public Interest (CSPI) and Representative Eliot Engel (D-NY) petitioned the FTC and the BATF to investigate the marketing of sweetened, premium malt beverages and hard lemonade, which they labeled “alcopops”. The petition called for the FTC to investigate the labeling and marketing practices for these beverages to determine whether companies are targeting underage drinkers, which would constitute an unfair marketing practice. The CSPI also asked the ATF to require alcohol makers to submit marketing information, revise their labeling, disclose their marketing plan and assess the potential impact of advertising sweetened malt beverages and hard lemonade on underage consumption.

No action has been taken by the FTC or the ATF on these petitions.

Distilled Spirits Advertising

The December decision by the NBC television network to accept commercials for liquor products placed a new spotlight on distilled spirits advertising on the broadcast media. Commercials for distilled spirits have appeared on hundreds of local broadcast and cable stations over the past few years. However, an ad that appeared on the December 15th episode of “Saturday Night Live” was the first distilled spirits ad on a major broadcast network.

A number of policymakers, including FCC Commissioner Michael Copps, were very critical of the decision by NBC to accept commercials for distilled beverage products. Congressman Ed Markey (D-MA), the ranking Democrat on the Telecommunications Subcommittee of the House Energy and Commerce Committee, argued that the new policy was contrary to the network’s “public interest” responsibilities under federal law. Virginia Congressman Frank Wolf, Chairman of a key subcommittee of the House Appropriations Committee, has threatened legislation to block liquor ads from broadcast television. Senator Fritz Hollings (D-SC), Chairman of the Senate Commerce Committee, may hold hearings on the issue. The CSPI and the American Medical Association also have called for new federal regulation of broadcast advertising for distilled spirits products.

ANA's Position

ANA does not believe that any new federal regulation is necessary in this area. The FTC already has sufficient power to regulate effectively in this arena. The U.S. Supreme Court has emphasized several times that alcohol beverage advertising has substantial protection under the First Amendment and that ads for alcohol beverage products cannot be restricted merely because the underaged can see them. We have met with the FTC and reiterated our position that restrictions on advertising predicated on allegations of targeting the underaged need to be very carefully scrutinized so that legitimate advertising to adults is not restricted.

The FTC has been active in overseeing distilled spirits advertising. The agency brought several cases against alcohol beverage marketers and conducted a major review of advertising self-regulation in the alcohol industry in the fall of 1999. The FTC, not the FCC, has the background and experience to most effectively analyze and regulate this category of advertising.

Several years ago, two former Chairmen of the FCC, Reed Hundt and William Kennard, proposed banning or restricting broadcast advertising for distilled spirits products, based on the "public interest" standard. ANA filed extensive comments with the FCC and Congress, pointing out First Amendment concerns and arguing that regulation of this area should remain with the FTC.

Next Steps

We will continue to monitor developments in this area and respond to any proposals for new federal regulation of alcohol beverage advertising.

Dietary Supplements

Background

Dietary supplements are a fast-growing product category and there has been a significant increase in consumer marketing for these products. While the Food and Drug Administration (FDA) has primary responsibility for labeling claims, the Federal Trade Commission (FTC) has authority to regulate advertising claims for these products.

Status

Throughout the year, increased concern has been enunciated by critics and some regulators and legislators about certain ingredients in dietary supplements and how the industry markets their products to consumers. The FTC has brought several enforcement cases and recently published an advertising guide for the dietary supplement industry. That guide is available at the FTC's website at www.ftc.gov. The guide provides a number of examples of how dietary supplement manufacturers can adequately substantiate any claims made in their advertising.

Legislation has been introduced in the House of Representatives to regulate information to consumers about the health benefits of the supplements. Representative Ron Paul (R-TX) introduced *Foods are not Drugs Act* (H.R. 2265), which calls for more access to health benefit information about dietary supplements by consumers. No action has been taken on the bill.

ANA's Position

ANA supports the right of dietary supplement manufacturers to provide truthful, nondeceptive information to consumers about the benefits of their products.

Next Steps

We will continue to monitor closely legislative and regulatory developments in this fast-growing industry.

American Federation of Musicians

Background

The Joint Policy Committee on Talent Union Relations (JPC), which is made up of the ANA and the American Association of Advertising Agencies' (AAAA) members, carries out collective bargaining negotiations with all of our nation's talent unions covering actors, singers, dancers, musicians, voice overs, drivers, stunt performers, and the like appearing in our country's television and radio commercials.

The American Federation of Musicians (AFM) three-year contract covering television and radio commercials expired in October 2001. The JPC entered into negotiations with the AFM in October over a new three-year contract and negotiated over the AFM proposal to expand the contract to cover Internet commercials.

Status

Contract negotiations were finalized on October 17, 2001 and an agreement was reached on a new agreement, which will extend until October 16, 2004. The terms included new minimum rates for session and initial use fees as well as other wage and benefit provisions. The overall package amounts to a 6% increase spread over three years. Provisions were also made to encompass commercial announcements over the Internet and other specifications were made regarding non-broadcast use. Lastly, the JPC and the AFM agreed to establish new Internet guidelines. Both sides realize that the Internet is constantly evolving as an advertising medium and that such a medium should be assessed throughout the terms of this agreement. The contract over its three-year life will produce more than \$100,000,000 in payments to musicians used in commercials.

ANA's Position

ANA in conjunction with the AAAA's will continue to foster and develop predictable, fair, and equitable contracts with the talent unions.

Campaign for Freedom

Background

The Ad Council was established in 1942 by ANA and several other industry groups as the War Advertising Council, to rally support for World War II-related efforts. Since the end of that war, the Ad Council has continued and thrived as the central body through which volunteers from business, advertising and media create and distribute public service advertising campaigns to address pressing social issues. The Ad Council and the advertising community are now developing an on-going campaign to help Americans respond to the terrorist attacks of September 11th. The effort is called the “Campaign for Freedom.”

Status

Leaders from ANA, the Ad Council and other industry groups met just days after the September 11th attacks to begin developing an industry response. There was strong consensus that the Ad Council should act as the organizing body to leverage the advertising industry’s power to influence attitudes and behaviors in support of America’s efforts. The Ad Council has a strong track record. Since 1942, almost \$30 billion in media space and time has been donated in support of various Ad Council campaigns.

The objective of the Campaign for Freedom is to create messages that will inform, involve and inspire Americans to participate in activities that will strengthen our nation and help win the war against terrorism. Several television spots have already been produced and aired, including a message from First Lady Laura Bush urging parents to talk to their children about their fears and feelings. A variety of other messages will be produced as events unfold over the coming months.

More information about the Campaign for Freedom is available at the Ad Council’s website at www.adcouncil.org.

Next Steps

ANA and other leaders in the advertising and business industry are also working with the U.S. State Department to respond to the terrorist attacks. As one part of this effort, our government is seeking ways to better describe America’s core values and beliefs to other countries, particularly countries with substantial Islamic populations. Charlotte Beers, a longtime leader in the advertising community, is now serving as Under Secretary of State for Public Diplomacy and Public Affairs. Leaders from ANA and other industry groups plan to meet soon with Under Secretary Beers to provide input about improving external communications concerning U.S. values of freedom, tolerance and economic progress.

International Advertising Issues

Background

A broad range of issues affecting the ability of marketers to communicate with consumers around the globe continues to surface. As legislative and regulatory bodies debate advertising issues, advertisers are increasing their efforts to organize and share pertinent information.

In 2000, for example, ANA participated in the First Global Advertising Summit, convened by the World Federation of Advertisers (WFA). We identified a number of key issues affecting international advertising, including ad taxes, Internet-related issues, children's advertising, copyright and privacy issues. The Summit called on all marketers on the Internet to post clear and meaningful privacy policies.

Status

ANA helped organize and participated in the Second Global Advertising Summit which took place in Washington, D.C. in April. Once again, online privacy issues were a major focus of the summit.

We also alerted our members to several proposals from the governments in Mexico, Israel and Argentina that would have seriously restricted American marketers. For example, under the proposal in Argentina, 75% of all commercials would have to be produced in Argentina. ANA and other industry groups held a series of meetings with the U.S. Department of Commerce and the U.S. Trade Representative's office to discuss the importance of protecting the interests of American companies in the global marketplace.

Next Steps

Through our Global Marketing Committee and our membership in the WFA, ANA will continue to identify issues and threats from around the globe that would affect the interests of American marketers.

Coalitions

ANA is a member of several key coalitions. These coalitions, which track and respond to a wide range of advertising issues, strengthen ANA's lobbying efforts. Through the coalitions, ANA and its sister organizations are able to develop research, provide educational materials, and have a common voice within the industry when lobbying Congress and government agencies.

Freedom to Advertise Coalition

The Freedom to Advertise Coalition's (FAC) purpose is to oppose proposals that restrict truthful and non-deceptive advertising for any legal product or service. FAC's members include ANA and five other associations: the American Advertising Federation (AAF); American Association of Advertising Agencies (AAAA); Magazine Publishers of America (MPA); the Outdoor Advertising Association of America (OAAA); and the Point of Purchase Advertising Institute (POPAI).

Since its formation in 1987, the efforts of the FAC have been successful against government agency and congressional proposals to restrict advertising. In 2001, FAC played an active role in resisting bans on alcohol and tobacco advertising, promoting self-regulation for online services, opposing regulations and legislation against direct-to-consumer prescription drug advertising, and reacting to issues surrounding videogame, music or movie content that impacts advertising.

Advertising Tax Coalition

The Advertising Tax Coalition (ATC) was established in 1988 to direct the fight against federal advertising tax proposals. There are currently nine member associations including the ANA; American Advertising Federation (AAF); American Association of Advertising Agencies (AAAA); Grocery Manufacturers of America (GMA); Magazine Publishers of America (MPA); National Association of Broadcasters (NAB); National Newspaper Association (NNA); Newspaper Association of America (NAA); and the Yellow Pages Publishers of America (YPPA). In its efforts to prevent such proposals, the ATC meets with members of the tax-writing committees in Congress to educate leaders of the importance of advertising to the economy and the importance of not undermining this key engine of the economy through taxation.

State Advertising Coalition

In 1986, the ANA, The American Association of Advertising Agencies (AAAA), and the American Advertising Federation (AAF) formed the State Advertising Coalition (SAC) to provide information and resources necessary to combat state and local overly restrictive advertising proposals. Since its formation, SAC has been successful at

responding and defeating all ad tax proposals in the states. During 2001, SAC directed its efforts towards Tennessee, Minnesota, and Nebraska. No new ad tax legislation passed in any of the states in which it was proposed.

Privacy Leadership Initiative

In 2000, the Privacy Leadership Initiative (PLI) was launched with strong support from the CEOs of 30 major companies and associations. PLI's goals are to give consumers control over their privacy, accelerate adoption of privacy technologies, improve current accountability programs, and to launch business and consumer education campaigns.

In addition, PLI is charged with developing data on privacy and the benefits of the open flow of information. ANA is a founding member of the Privacy Leadership Initiative and its research committee. Among its efforts, PLI has designed and executed economic and policy studies demonstrating the value of the free flow of information to consumers and businesses. While PLI will remain neutral on legislation, its research will be made available to Congress, regulators, the news media and key opinion leaders. The PLI's website can be found at www.understandingprivacy.org.

Coalition for Healthcare Communication

In 1991, the Coalition for Healthcare Communication (CHC) was formed to defend organizations that dedicate their time to provide truthful information about pharmaceutical and medical products without inappropriate government intervention. The CHC advocates the flow of this information to health professionals and consumers for educational purposes so that prescription drugs and medical devices can be used efficiently and safely.

The members that form the CHC include the ANA; American Association of Advertising Agencies (AAAA); American Advertising Federation (AAF); American Medical Publishers Association (AMPA); Association of Medical Publications (AMP); Healthcare Businesswomen's Association (HBA); Healthcare Marketing and Communications Council (HMC Council); Medical Marketing Association (MMA); Midwest Healthcare Marketing Association (MHMA); and the Public Relations Society of America (PRSA). The Coalition's website can be found at www.cohealthcom.org.