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**ANA**

# **Compendium of Legislative, Regulatory and Legal Issues**

**2003**



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# Introduction

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The Washington, DC office of the Association of National Advertisers (ANA) confronted a considerable number of serious legislative, regulatory and legal challenges to advertising in 2003. There was unprecedented activity on a broad variety of issues, especially concerning the tax deductibility of advertising expenses, direct-to-consumer prescription drug advertising and unsolicited commercial e-mail. We also witnessed a number of battles in the courts over the First Amendment rights of advertisers, most significantly in the *Nike* case.

The advertising community now faces a far more complex and challenging political environment. At least three factors are creating this environment. First, economic difficulties over the last several years have forced many state governments to consider new taxes on advertising and other business services to fund their budgets. The ballooning federal budget deficit also increases the risk of a federal ad tax battle. Second, the increased focus on health care costs has spurred some critics to blame advertising for both driving up health care expenditures (through DTC advertising) as well as encouraging unhealthy lifestyles (through food, tobacco and alcohol beverage advertising). Finally, consumers are pushing back more aggressively than ever before in regard to unwanted commercial messages, through do-not-call, do-not-spam, do-not-fax and commercial blocking technologies. The potential spillover of consumer anger poses serious, growing challenges to marketers in all media environments and at all levels of government.

Following is a summary of the most significant challenges we faced in 2003:

- 1. Taxes:** There was an unprecedented number of advertising tax proposals on the state level: 17. All but one of these proposals was defeated. The most significant developments were in Connecticut, Texas and New Jersey. In February, Connecticut passed a 3% tax on advertising creative services as part of a budget package, after a 6% tax on all advertising services was vetoed by Governor John Rowland. After considerable industry lobbying, the 3% tax on creative services was repealed in July in a subsequent budget agreement. The Texas Senate approved a school finance bill in May that would have extended the sales tax to all services, including advertising that in some localities in Texas would have reached as high as 9.25%. This bill was defeated by the Texas House of Representatives, but a special session of the Texas Legislature is expected to be called by the Governor early in 2004 to tackle the school finance issue. In early July, after a political scandal involving state officials and the local billboard industry, the New Jersey Legislature passed a budget that included a one-year 6% tax on all billboard advertising in the state. We are presently working hard to see that this tax is not extended in the future.
- 2. Prescription Drugs:** There were two attempts on the Senate floor by Senator John Edwards (D-NC), a candidate for the 2004 Democratic nomination for President, to add an amendment to the Medicare prescription drug benefit legislation mandating substantial new disclosure requirements for direct-to-consumer prescription drug advertising. These requirements would have substantially undermined the ability to carry out this type of advertising. ANA and other industry groups actively opposed the proposals and both amendments were ultimately defeated by a wide margin. These were the first votes ever held on DTC prescription drug advertising in the Congress.

3. **The Courts:** In a disappointing decision for the advertising community, the United States Supreme Court decided in July that it should not have agreed to hear the *Nike* case. That case raised serious issues for all marketers and ANA had filed a “friend of the court” brief with the Court. The original parties to the case settled out of court in September, leaving the First Amendment issues in the case unresolved. ANA will do all that it can to see that this dangerous precedent is overturned while working to increase the protection of commercial speech in a series of other cases.
4. **Spam:** The industry scored a major victory in December when the House of Representatives agreed to the Senate’s version of S. 877, the CAN-SPAM Act. President George W. Bush signed the bill soon after. The bill prohibits false or misleading header and subject line information and requires a clear and conspicuous opt-out. However, it also calls for the FTC to study the feasibility of a “do-not-spam” list, to which ANA remains opposed. Prior to Congressional passage of the legislation, we worked with our industry allies, the Direct Marketing Association (DMA) and the American Association of Advertising Agencies (AAAA) to devise self-regulatory guidelines of best practices for e-mail marketers.
5. **Fax Advertising:** The Federal Communications Commission (FCC) issued new rules regarding unsolicited commercial faxes that effectively would severely limit its use as a tool to reach consumers. The new rules would require prior express written consent from the recipient before a fax advertisement could be sent. In conjunction with the National Association of Broadcasters (NAB) and AAAA, ANA filed comments with the FCC stating our strong opposition to the proposal.
6. **“Do-Not-Call” Rules:** A U.S. District Court Judge blocked the Federal Trade Commission’s implementation of a “do-not-call” registry for telemarketing calls on First Amendment grounds. This ruling was later stayed to allow the FTC to temporarily enforce the rules regarding the registry. ANA is monitoring developments as this case progresses to the U.S. Supreme Court. We previously had made a detailed filing with the FTC on this issue.
7. **Alcohol Beverage Advertising:** Reports critical of the marketing practices of the alcohol beverage industry were released from the Center on Alcohol Marketing and Youth (CAMY) and the National Academy of Sciences (NAS). A more positive report was issued by the Federal Trade Commission, which found that the alcohol beverage industry is not directly targeting minors in its advertising for malt beverages. The FTC also lauded the industry for tightening their self-regulatory guidelines for ad placement, requiring at least 70% of the audience to be adult. These new self-regulatory standards go beyond what could be imposed by the government.
8. **Food Advertising and Obesity:** Attacks blaming the food industry as a cause of obesity continued. A bill was introduced in the New York State Assembly that would have denied the tax deduction of advertising expenses for advertising on food, video games and movies directed at children. The food industry also faced challenges in the courts. ANA is working with the Grocery Manufacturers of America (GMA) and other industry groups to oppose new restrictions on food marketing. We are also working with the World Federation of Advertisers (WFA) on an international response to attacks on food marketing.

9. **Tobacco Advertising:** Tobacco advertising remained under threat, as a draft bill to give authority over tobacco products and marketing to the Food and Drug Administration (FDA) circulated again this year in the Senate Health, Education, Labor and Pensions Committee. There were attempts to link it to a bill to end the tobacco quota program before negotiations broke down in October. These ad restrictions, if ever passed into law, would be the most extensive ever placed on any product in the United States.
10. **Privacy:** Privacy continued to be an issue for ANA, especially at the state level. California passed two very restrictive bills limiting the use of consumer information. There was also activity at the federal level, as the FTC held a workshop on the value of information flows in the economy, and bills relating to privacy were introduced in the Congress. ANA filed detailed comments with the FTC on this subject.
11. **SAG/AFTRA:** The Joint Policy Committee of ANA and AAAA made major progress in September. For the first time in the 50-year history of contract negotiations, an agreement on a new contract with the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA) was reached and ratified by the unions' joint Board of Directors before expiration of the previous collective bargaining agreement. The agreement has now been overwhelmingly approved by the union membership.

We continually provide updates on these issues, and others that we are tracking, on our website. Our Legislative, Regulatory and Legal Tracking System can be found on the Government Relations page of ANA's website, at <http://www.ana.net>. In addition, any filings or letters we have submitted are typically posted in the "What's New" section of the Government Relations page.

If you have questions about any of these issues, please contact ANA's Washington office at 202-296-1883 or at [washington@ana.net](mailto:washington@ana.net)



# Advertising Tax Deductibility

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## Background

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Advertising expenditures receive full tax deductibility as an ordinary and necessary business expense. Nonetheless, this deduction repeatedly has been under attack at all levels of government. While an across-the-board advertising tax has not been seriously considered since 1990 (during the administration of President George H.W. Bush), there has been a continuing drive to eliminate the advertising tax deduction for several product categories. In the last couple of years, this effort has been focused on the tax deduction for prescription drug advertising to consumers. Working with the Advertising Tax Coalition (ATC), ANA has been able to defeat these proposals, and advertising retains its full deduction at the federal level.†

ANA has been actively involved in trying to convince lawmakers that taxes on advertising are misguided. In 1997, the WEFA Group conducted a study (by Nobel Laureate in Economics Lawrence Klein) on behalf of the ATC that examined the economic impact of advertising on each Congressional district in the United States. The study demonstrated that advertising generated \$2.4 trillion in total economic activity in the U.S. in 1997, and supported 18.2 million of the 126.7 million jobs in the nation. Additionally, it found that advertising expenditures contribute to 12-15 percent of the private-sector revenues in every Congressional district. This was true of both urban and rural districts. The WEFA Group projected that advertising activity would continue to make a substantial contribution to the nation's economy throughout the study's forecast horizon, which was through 2002.

## Status

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Both houses of Congress spent a great deal of time working on developing a Medicare prescription drug benefit program. Some members tried to link this debate to an attack on advertising through the imposition of taxes. Representative Jerrold Nadler (D-NY/8), for example, reintroduced his proposal from the 107th Congress, the Say No to Drug Ads Act (H.R. 149), that would have denied the deduction of expenses for direct-to-consumer advertising. Congressman Nadler's cosponsor, Representative James Crowley (D-NY/7), introduced a similar proposal as part of a Medicare prescription drug benefit bill (H.R. 1733). Congressman Crowley's proposal contained other provisions, including one prohibiting chief executive officers of drug companies from making contributions to political parties or candidates for elective office. Representative Patrick Kennedy (D-RI/1) also reintroduced his proposal from the last Congress, the Prescription Affordability and Medicine Safety Act of 2003 (H.R. 2640), that would have limited the deduction to fifty percent of a drug company's research and development expenses.

Representative Michael Michaud, a freshman Democrat from Maine, introduced a proposal with a twist. His legislation, the America Rx Act of 2003 (H.R. 1694), would have required the Secretary of Health and Human Services to negotiate rebate agreements with drug manufacturers to reduce the price of drugs for individuals without access to discounted drugs.

† See the section on State Advertising Tax Deductibility (page 7) for state developments in this area.

If a company failed to enter into an agreement, it would have been denied the advertising tax deduction.

None of this legislation was acted on by Congress.

### **Next Steps**

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With the nation facing a record budget deficit (the Congressional Budget Office (CBO) is projecting a deficit of \$480 billion for Fiscal Year 2004), it is possible that Congress and the President will look for new and novel sources of revenue. The general threat to advertising's tax-deductible status will not disappear anytime soon. We are prepared to vigorously fight any attempt to limit or prohibit the ability of companies to deduct advertising expenses, now or in the future.

# State Advertising Tax Deductibility

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## Background

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Some of the greatest challenges ANA faces virtually every year are attempts to limit the tax deductibility of advertising expenses at the state level. This type of political initiative was particularly in evidence in 2003, as we faced an unprecedented number of ad tax proposals at the state level. At various times in the past year, proposals were considered in 17 states.

Since 1987, when Florida passed an across-the-board ad tax and then dropped it after six months, we have faced more than 100 proposals in over 40 states. ANA is a founding member of the State Advertising Coalition (SAC), which actively opposes advertising taxes at the state and local level. We have also utilized our membership in the Advertising Tax Coalition (ATC) to our advantage in these battles.

## Status

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Due to the serious budget shortfalls facing many states, and the sluggish economic recovery from the 2001 recession, the advertising community faced significant new challenges in the past year. While we faced proposals to limit or remove the advertising tax exemption in 17 states in 2003, the most significant developments on this front took place in Connecticut, Texas and New Jersey.

### *Connecticut*

In February, Connecticut was facing a \$650 million budget shortfall for fiscal year 2003 and nearly \$1 billion for fiscal year 2004. To help close the gap, House Speaker Moira Lyons and the Democratic leadership in the General Assembly proposed extending the state's 6% sales tax to cover all advertising, including the purchase of time and space. We immediately contacted Governor John Rowland (R) and the General Assembly leadership to express our strong opposition to this proposal. Subsequent negotiations and intense industry lobbying saw the scope of the proposal reduced to a 6% tax on advertising creative services. The General Assembly passed a budget containing this proposal in mid-February, but the Governor vetoed it on February 20th. The proposal was then scaled back further, to a 3% tax on advertising creative services, and this passed as part of a budget deal and was signed by the Governor in the first week of March. Soon after signing the bill, the Governor cited the 3% tax as one of two "nuisance taxes" that should be repealed (the other was a 6% tax on newspaper subscriptions).

Despite the Governor's statement, the tax was included in his budget proposal for FY2004. After a series of intense negotiations, the 3% tax on creative services was repealed by the budget agreement for 2004, passed by the Assembly and signed by the Governor in late July. While this tax was relatively small, the repeal was important as it once again sent a message to the states that taxing advertising was counterproductive.

ANA was actively involved on the ground in Connecticut. We wrote to the House and Senate leadership on a number of occasions. Shortly after the proposal was introduced, a representative from ANA attended a meeting in Hartford to help organize the Connecticut Advertising

Alliance. The Alliance was a coalition of advertisers, broadcasters, publishers, ad agencies and other industry groups whose main objective was to work for the repeal of the tax. We also joined with the American Association of Advertising Agencies (AAAA) and hired an experienced lobbyist in Hartford as an advocate for the industry's position.

### *Texas*

Texas faced a budget shortfall of \$13 billion for the 2004-2005-budget cycle. It is one of the few states remaining that does not impose a state income tax. It also was in the midst of a court-ordered program to revamp the state system for providing education funds to local school districts. In looking for new sources of revenue, Texas Lieutenant Governor David Dewhurst (R) proposed raising the state sales tax rate and extending it to all services except medical and dental services. This included advertising. ANA contacted each member of the Senate detailing our opposition to the proposal. The Senate passed the school finance bill, but the House of Representatives rejected it. In our favor, both House Speaker Tom Craddick (R) and Governor Rick Perry (R) made known their opposition to the proposal.

The legislature adjourned in June without further action, but a special session dealing with the school finance problem is expected in the spring of 2004. The Legislature's Joint Select Committee on Public School Finance, which considered various proposals, in December, also held hearings. In anticipation of this battle next year, ANA, the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF) have hired an experienced lobbyist in Austin. We are actively monitoring developments in the Texas Legislature and will work with member companies and other industry groups to oppose any effort to tax advertising.

### *New Jersey*

The situation in New Jersey was a bit different than those in either Connecticut or Texas. The tax passed there was a 6% fee on the gross amounts collected by a retail seller for billboard advertising purchased between July 1, 2003 and June 30, 2004. It arose out of a bribery scandal involving billboard companies and state officials. The tax was also meant to raise new revenue in order to close a budget shortfall. In the meantime, Governor James McGreevey (D) has appointed a special task force to examine the entire billboard industry in the state. ANA and other industry groups are working with the Outdoor Advertising Association of America (OAAA) to oppose any extension of this tax on billboard advertising.

### *Other State Proposals*

- Arkansas: Four bills were introduced in Arkansas, three in the House of Representatives and one in the Senate. HB 2266 would have imposed the gross receipts tax on a number of "nonessential services," which surprisingly included advertising on the list. HB 1317, HB 2664 and SB 824 would have imposed the same tax on advertising time and space. We wrote to the relevant committees regarding these bills, stating our opposition to a tax on advertising. These bills all died when the legislature adjourned in April. However, two committees of the state legislature held hearings in November to discuss ending various sales tax exemptions, and in a second special session of the legislature held in December, a bill to tax advertising space and time to raise revenue for the state educational system was introduced in the Arkansas House (HB1016). None of these bills, however, was finally acted on.

- California: No specific bill was introduced in California, but the Legislative Analyst's Office (LAO) had suggested broadening the sales tax base to cover more services. The LAO specifically singled out entertainment services. Conversely, it noted the difficulty of administering new service taxes. California faced a record \$38 billion budget shortfall and after months of negotiations, ultimately passed a budget with spending cuts and various fee increases, but no taxes on advertising.
- Florida: In August, three prominent former elected officials - former Senate President John McKay, former Senator Jack Latvala and former Comptroller Bob Milligan – began a petition drive to get a proposed constitutional amendment to require a decennial review of sales tax exemptions on the ballot for 2004. The proposal would require a 3/5 vote in the legislature for exemptions to be reinstated. Any exemption not reinstated would be eliminated. Former Senator McKay has been an active opponent of sales tax exemptions in the past and pushed to eliminate the exemption for advertising. We will pay close attention to the petition drive as it progresses, as Florida was once ground zero for ad taxes.
- Kansas: In the past legislative session, more than 60 separate bills were introduced to eliminate sales tax exemptions, including HB 2075, which would have eliminated the exemption for broadcast media and advertising agencies. ANA wrote to the members of the House Taxation Committee in opposition to the bill. All of these bills died when the legislature adjourned at the end of May.
- Maine: A draft bill (LD 503) was introduced that would have reduced the sales tax rate but extend this lower rate to all services. It died when the legislature adjourned in June.
- Michigan: No ad tax bill was introduced in Michigan, but the President of the state education association had proposed a tax on advertising to help fund education programs. We wrote to the Governor of Michigan, Jennifer Granholm (D), stating our opposition to a tax on advertising. No legislative action was taken on the proposal.
- Nebraska: Again this year, a bill was introduced in Nebraska to extend the sales tax to cover almost all services. The bill, LB 397, would have also reduced sales tax rates. ANA worked with local industry groups to fight the proposal. A hearing was held at the Revenue Committee in March, but no further action was taken on the bill.
- New Mexico: A bill was introduced to impose a 20% co-payment on consumers who purchase prescription drugs that have been advertised in mass media. This would be in addition to the regular co-payment under the consumer's prescription plan. ANA wrote to the New Mexico legislature in opposition to this proposal. It was approved by the Senate Public Affairs Committee in March, but died when the legislature adjourned later that month.
- New York: Bills were introduced in both the New York Assembly and Senate to impose a 4% sales tax on all casino advertising in the state. The additional revenue raised would be used to fund programs for compulsive gambling education and treatment programs. A bill was also introduced in the New York Assembly by Assemblyman Felix Ortiz (D) that would impose a special sales tax on certain foods, videos, movie tickets, and on television advertising for these products on programming directed at children under 18. The revenue raised by this bill would go to fund programs dealing with childhood obesity.

This bill, AB 9145, was introduced on the last day of 2003's legislative session and no action was taken.

- Ohio: Ohio faced a budget shortfall of over \$3 billion for fiscal year 2004. HB 95 removed the exemption for a number of services in Ohio. The version passed in June did not include advertising.
- Oklahoma: No specific bills were introduced, but legislators considered temporarily suspending certain tax exemptions, including the exemption for advertising, to close a \$600 million budget shortfall. ANA wrote to the members of the Oklahoma Legislature to express our opposition to a tax on advertising. The Legislature adjourned on May 30th with no change in the exemption for advertising.
- Oregon: A bill (HB 3453) was introduced in the Oregon House of Representatives that would have eliminated the state advertising tax deduction for the costs of "mass media advertising" of prescription drug products. The bill was still in the Business, Labor and Consumer Affairs Committee when the legislature adjourned on August 27th.
- South Dakota: Two bills were considered in 2003 to remove the exemption for advertising. HB 1216 would have taxed all advertising services. HB 1207 would have done the same, but would have used the revenue to fund a teacher award program. We contacted members of the legislature in opposition to these bills, and they died without committee action being taken when the legislature adjourned in March.
- Virginia: The Commission on the Revision of Virginia's State Tax Code recommended various proposals to revise and update the state's tax code in September. One of the proposals it put forth was a repeal all sales tax exemptions. Governor Mark Warner (D) announced his plans for the tax code after the state's November legislative elections, and it did not include any taxes on services.

## **ANA's Position**

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An advertising tax, whether federal or state, across-the-board or product-specific, is a bad idea. States such as Arizona, Iowa, Florida and now Connecticut have repealed taxes on advertising, either because of the damage it does to the economy or the difficulties in administering such a complex tax. A study conducted for the Advertising Tax Coalition by the WEFA Group shows that the advertising industry is responsible for 18.2 million jobs in the United States, and for as much as 16 percent of private sector revenue. It found that advertising's substantial job impact held true for every Congressional district in the country, urban or rural, industrial or agricultural. Curtailing this significant amount of economic activity would drastically slow economic growth.

## **Next Steps**

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The National Conference of State Legislatures (NCSL) reported in July that cumulatively, the states have had to close a \$200 billion budget deficit over the past three years. It also noted that the states may be emerging from this budget crisis, which it has called the worst since World War II. However, many states used "one time only" accounting measures and tapped into "rainy day" funds to balance their budgets this year, and such tools may not be at their disposal

next year. The incentive to expand taxes to services such as advertising will persist. ANA remains adamantly opposed to this counterproductive approach. We will continue to provide concrete examples, such as those provided by the WEFA Study, and others, of the benefits of advertising. We will work with our member companies and other industry groups to oppose any efforts to tax advertising at the state level.



# Direct-to-Consumer Prescription Drug Advertising

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## Background

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Direct-to-consumer prescription drug advertising has been a “hot-button” issue since the Food and Drug Administration (FDA) revised the regulations governing it in 1997. At that time, the FDA clarified their rules to allow broadcast of DTC ads without requiring crippling disclosure requirements. Spending on DTC advertising has risen from \$600 million in 1997 to more than \$2.6 billion in 2002. This dramatic growth has helped consumers receive far more information about prescription drugs. However, DTC advertising, at the same time, came under severe attack, charged with being a major factor in the high cost of prescription drugs.

## Status

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### *Federal Activity*

One of the main issues confronting the 108th Congress was passing a Medicare prescription drug benefit bill. Congress had tried repeatedly over the past several years to approve a plan to add a drug benefit to the senior citizen health care program. It finally passed this legislation in November.

ANA actively monitored the developments surrounding these bills in case any threats to DTC advertising arose. In past years, bills dealing with DTC advertising have been discussed in conjunction with Medicare drug benefit legislation, but none had ever been acted upon on the Senate or House floor. However, this year, for the first time, the issue of direct-to-consumer prescription drug advertising came up for two votes in the Senate. Working with the Advertising Tax Coalition (ATC) and our prescription drug company members, we successfully defeated these two attempts to effectively ban this form of advertising.

In June, Senator John Edwards (D-NC), a candidate for the 2004 Democratic nomination for President, and Senator Tom Harkin (D-IA), introduced an amendment to the Senate’s Medicare prescription drug benefit bill that would have made DTC advertising prohibitively expensive. It required all ads to “present a fair balance” between information relating to efficacy and side effects, and between the “aural and visual presentations” of the information. It also required ads for a drug to contain information regarding its effectiveness in comparison to other drugs. Drug companies would have been mandated by the FDA to compile this information in order to receive a drug approval. When the first version of the amendment failed by an overwhelming vote of 69 to 26, Senators Edwards and Harkin removed the FDA pre-clearance requirements and instead focused solely on forcing new broad prescription drug advertising disclosures. This second amendment also failed, by a vote of 59 to 39.

We again faced a number of bills that would have restricted or eliminated the tax deductibility of expenses for DTC advertising as well. These included a proposal by Representative Jerrold Nadler (D-NY/8) to deny totally the deduction of expenses for direct-to-consumer advertising

(H.R. 149); legislation by Representative Patrick Kennedy (D-RI/1) to limit the deduction to fifty percent of a drug company's research and development expenses (H.R. 2640); and a proposal by Representative James Crowley (D-NY/7) that would have not only eliminated the deduction, but also would have prohibited chief executive officers of drug companies from making contributions to political parties or candidates for elective office (H.R. 1733). It also included a bill (H.R. 1694) by Representative Michael Michaud (D-ME/2) that would have required the Secretary of Health and Human Services to negotiate rebate agreements with drug manufacturers to reduce the price of drugs for individuals without access to discounted drugs. If a company failed to enter into an agreement, it would have been denied the advertising tax deduction. And finally, once again this year, Representative Pete Stark (D-CA/13) put in his bill (H.R. 3155) that would have denied the tax deductibility of prescription drug advertising unless the ads contained a "fair balance" between benefit and risk information. This legislation continued to require the type of detailed disclosures that made television advertising virtually impossible before 1997.

The prescription drug advertising issue, however, remained at the forefront in Congress in July, when the Senate Special Aging Committee held a hearing on DTC advertising. The Committee heard from representatives from the FDA and the Pharmaceutical Research and Manufacturing Association of America, as well as from opponents of DTC advertising. In advance of the hearing, we took part in numerous meetings with members of the Committee and their staffs. The Chairman of the Committee, Senator Larry Craig (R-ID), subsequent to the hearing continued to state his concerns that DTC advertising is leading patients to pressure doctors into prescribing inappropriate drugs.

In October, another candidate for the Democratic nomination for President, former Vermont Governor Howard Dean, announced that if elected, he would support a near total ban on DTC advertising.

At the regulatory level, the FDA Commissioner, Dr. Mark McClellan, has indicated his desire to revise the Commission's requirements for DTC advertising. He specifically has mentioned a need to update the "brief summary" that accompanies DTC ads in print. The Commission held a two-day workshop on prescription drug advertising on September 22nd and 23rd. The workshop discussed the issues surrounding DTC. ANA helped to assure that experts on the important value of DTC advertising provided hard data on this issue at the FDA workshop. ANA also is helping to develop materials to supplement the record in this area, which will be submitted to the FDA, focusing on the issue of how inappropriate and overly detailed disclosures can lead to information overload and consumer confusion.

The Federal Trade Commission filed comments with the FDA in response to the workshop. The FTC's comments noted the favorable reactions in numerous studies to DTC ads by consumers. It argued that the "brief summary" requirement for print ads should be similar to the requirement for broadcast ads. The FTC would also like the FDA to clarify the "fair balance" requirement to prohibit only ads that convey a deceptive impression of the risks and benefits instead of ads that do not emphasize risk and benefit information equally.

### *State Activity*

Three states jumped on the anti-DTC bandwagon in 2003 as well. Legislatures in New Mexico, Oregon and Massachusetts all considered bills to restrict DTC advertising. Each of these bills

contained a unique feature. In February, a bill was introduced in the Massachusetts House (House No. 899) that would have required drug companies to contribute one dollar for every dollar they spent on advertising in the commonwealth to a special fund to finance its prescription drug program for senior citizens. Along with advertising, the bill included promotional expenses, such as free samples and visits to doctors by drug company representatives. The bill in New Mexico (HB 3453), introduced in March, would have imposed a 20 % co-pay on consumers who purchase a drug advertised outside of medical journals. This would have been on top of any out of pocket expense incurred by the consumer, including insurance company co-payments. Drug manufacturers would have been required to submit monthly lists to every pharmacy detailing what drugs they have advertised. Also in March, a bill was introduced in Oregon (SB 647) that would have removed the tax exemption for “mass media advertising” of prescription drugs. We wrote or contacted the various state legislatures detailing our opposition to these misguided legislative proposals that, in this session of the state legislatures, were not acted on.

### **ANA's Position**

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Critics of DTC advertising allege that these ads convince consumers that they need expensive and unnecessary newer medications, when older drugs would work just as well. These critics also claim that by promoting these medications to consumers, drug companies are hurting the doctor-patient relationship. Furthermore, they claim that DTC ads drive up the price of prescription drugs.

ANA, however, believes that DTC advertising is extremely valuable for consumers. It serves an important role in the doctor-patient relationship. Studies released in 2003 from the FDA itself (<http://www.fda.gov/cder/ddmac/globalsummit2003>), the National Consumers League (NCL) (<http://www.nclnet.org/dtcpr.htm>), and the National Medical Association (NMA) ([http://www.nmanet.org/120\\_131FB0203.pdf](http://www.nmanet.org/120_131FB0203.pdf)) show that prescription drug ads make consumers aware of critical medical problems and highlight treatments they may not know exist. They allow patients to exert more control over their health care decisions, arming them with the knowledge necessary to have frank and productive discussions with their doctors. These and other surveys have found that there is widespread support for DTC advertising among patients.

### **Next Steps**

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With the passage of the first prescription drug benefit under Medicare without any new advertising provisions, we successfully faced and overcame a number of serious challenges to direct-to-consumer prescription drug advertising this year. These challenges, however, are not likely to be resolved in the near future. Despite increasing evidence showing the positive benefits of DTC advertising, important critics remain in the government, in the media, and in academia. ANA will continue to work forcefully to protect the rights of drug companies to market their products and educate consumers.



# Privacy Issues

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## Background

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Privacy remains an increasingly important issue at the state and federal levels. With the expiration of the Fair Credit Reporting Act (FCRA) on December 31, 2003, it was anticipated that the reauthorization of this law governing consumer credit and financial information would be a potential vehicle for wider privacy legislation. ANA has been extremely active in regard to privacy issues over the past several years. We have worked, first as part of the Privacy Leadership Initiative (PLI) and now independently or as part of ad hoc coalitions to enhance the protection of consumer privacy. ANA has championed the development of fair privacy practices within the business community.

## Status

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### *Congressional Activity*

Reauthorization of FCRA was one of the items at the top of the Congressional agenda in 2003. A debate in Congress raged over whether FCRA was strong enough to protect consumer privacy, or if federal preemption should be removed to allow the states to set their own privacy standards. A number of hearings were held at the committee level in the Senate and the House. In the end, the House came down on the side of a single federal standard governing financial privacy, passing a bill in September that would preempt state laws. It also contained new provisions regarding consumer protection against identity theft. The Senate passed a similar bill in October that also contained federal preemption of state laws, and both Houses passed a conference report in November. The President signed it into law in December.

Congress also considered a number of bills relating to both offline and online privacy in 2003. Senator Dianne Feinstein (D-CA), who has taken a lead on identity theft and privacy issues in the Senate, reintroduced privacy legislation (S.745, the Privacy Act of 2003). This bill contained many provisions relating to offline and online privacy. It would have regulated the collection and use of personally identifiable information by requiring that marketers provide consumers with notice and the ability to opt-out of the sharing of non-sensitive information. Opt-in consent was required from the consumer for health and financial data. The bill established a safe harbor for entities that follow self-regulatory guidelines issued by "seal programs," and approved by the FTC. It also preempted state laws relating to the collection, disclosure and sale of personally identifiable information.

In the House, Representative Cliff Stearns (R-FL/6) is another Member of Congress at the forefront of privacy issues. As Chairman of the Energy and Commerce Committee's Commerce, Trade and Consumer Protection Subcommittee, Stearns introduced a new version of his bill, the Consumer Privacy Protection Act of 2003 (H.R. 1636). His bill also was wide-ranging, regulating both offline and online privacy. It required companies to provide clear and concise notice to consumers when they first attempt to collect personally identifiable information. Under the bill, consumers would have had to be given the opportunity to opt-out and thereby preclude the sale and disclosure of personally identifiable information to third party organizations. Companies

would have had to prepare and implement information security policies to prevent the unauthorized disclosure or release of personally identifiable information. This policy was also required to detail how corrective action was to be taken. Congressman Stearns' bill did not allow for a private right of action for individuals.

### *FTC Activity*

As usual, the Federal Trade Commission was actively involved in privacy issues this year. In June, the Commission held a one-day public workshop on the value of information transfer to the U.S. economy. The FTC examined the value of information for both consumers and businesses. ANA, drawing on studies conducted for the Privacy Leadership Initiative, submitted a filing for the workshop. Our filing demonstrated that the privacy of individuals can be protected without undermining the free flow of information. The filing also provided evidence of the value of advertising to the economic health of the country.

Without this free flow of information, businesses would not be able to effectively target their marketing to the appropriate audience, undermining the economic efficiency and competition of the marketplace. We urged the commission to foster a balanced framework for protecting consumer privacy without imposing unreasonable costs or restrictions on information transfer. Our filing can be read on the FTC's website, at <http://www.ftc.gov/bcp/workshops/infoflows/comments/ana.pdf>.

The FTC also completed implementation of its "do-not-call" list for restricting telemarketing calls in 2003. Consumers were allowed to begin signing up for the list in July, and telemarketers were required to register starting October 1st. As the deadline approached, however, the legal status of the list was cast into doubt. We had previously stated our concern about this proposal, urging the FTC to work with industry to find a private sector solution. More information on the "do-not-call" list can be found at <http://donotcall.gov> and in the section entitled The FTC's "Do-Not-Call" Registry, which begins on page 18 of this document.

### *State Activity*

Most of the attention at the state level in regard to privacy focused on California. Two bills were introduced by State Senator Jackie Speier (D-San Francisco). SB 1, introduced in late 2002, required financial institutions to provide a written notice to consumers detailing their information sharing practices. It required a company to obtain opt-out consent to share nonpublic personal information with affiliates and opt-in consent to share the same information with nonaffiliated companies. It also required that financial institutions would not be allowed to deny a consumer products or services because the consumer has not provided the necessary consent in the privacy area. The bill set civil penalties for violations of the Act as well. This bill passed in August.

Senator Speier then introduced additional legislation, governing non-financial institutions, in February. This bill, SB 590, was much more restrictive than SB 1. It prohibited companies from collecting or requesting information about a consumer during a transaction, except when the transaction cannot be accomplished in any other way or is required by law. It defined personal information very broadly, to include even an individual's name or physical description. The bill also severely restricted how companies can share information with third parties. It passed on the last day of the legislature's session in September.

## **ANA's Position**

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ANA strongly believes the free flow of information provides real and substantial benefits to both consumers and businesses. In fact, overly restrictive requirements placed on the flow of information would have a major negative impact on the nation's economic well-being. Responsible marketers understand that they must do all they can to protect privacy if they hope to keep consumers' trust and their business. The development of self-regulatory "best practices" and the flourishing of seal programs (TRUSTe, BBB Online and CPA Web Trust) provide clear evidence of the business community's willingness to respond to consumer concerns. It also shows the willingness of consumers to take control over the protection of their personal information.

ANA is concerned by the developments in California. As the most populous state, it is the largest market for commercial messages. It is often the incubator for ideas that spread nationally. With the passage of laws last year regulating the use of consumer information in North Dakota and Minnesota, we fear that marketers will soon face a patchwork of different, conflicting standards if they want to reach a national audience. This especially will have a dramatic, negative effect on online commerce. As the Internet knows no boundaries, it will be forced to comply with the most restrictive state laws, thus creating a *de facto* national standard.

ANA supports the enforcement of federal privacy laws already on the books by the Federal Trade Commission, combined with private sector initiatives, as the best way to protect consumer privacy. This strikes the best balance between the concerns of consumers about how their personal information will be used, and the ability of marketers to reach the right consumer, with the right product, at the right price, at the right time. Federal preemption becomes a necessity whenever there is a proliferation of inconsistent state laws.

## **Next Steps**

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While there was substantial Congressional, federal and state activity in the area of consumer privacy in 2003, it was somewhat overshadowed by the FTC's creation of a "do-not-call" list and the furor over unsolicited commercial e-mail and unsolicited faxes. The privacy issue, therefore, received less attention this year from the media and the public. But while this issue was not on the front burner, increased state activity almost insures that Congress will become more active on this issue in the near future.



# The FTC's "Do-Not-Call" Registry

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## Background

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The Federal Trade Commission (FTC) was given the authority by Congress, under the Telemarketing and Consumer Fraud and Abuse Prevention Act, to devise and enforce regulations prohibiting abusive, deceptive and unwanted telemarketing calls. The regulation it promulgated in response is known as the Telemarketing Sales Rule (TSR). In 2002, the FTC issued a Notice of Final Rulemaking that made major changes to the Telemarketing Sales Rule. The changes included the creation of a national "do-not-call" registry. Consumers could contact the FTC to register for the list, and all telemarketing calls under the FTC's jurisdiction would be blocked. Telemarketers would be required to purchase access to the list or risk fines up to \$11,000.00 per violation.

## Status

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The FTC began implementation of the new rules in February, after Congress provided the necessary funding in the Fiscal 2003 appropriations bill, and authorized the FTC to collect funds from telemarketers to pay for the operation of the list. Consumers began signing up for the registry in July, with enforcement scheduled to begin on October 1st. By the middle of September, over 50 million numbers had been registered.

A number of lawsuits were filed in response to the FTC's actions by the telemarketing industry, seeking to block implementation of the list. On September 25th, in the United States District Court for the Western District of Oklahoma, Judge Lee R. West, in *U.S. Security, et. al. v. Federal Trade Commission* (No. CIV-03-122-W) blocked the rule in a case filed by the Direct Marketing Association (DMA), among others. The suit alleged that the FTC was not given the express authority by Congress to create a national "do-not-call" registry, and the final rule violated the First Amendment by discriminating against speech based upon content. Judge West ruled that Congress expressly granted authority to the Federal Communications Commission (FCC) to create a "do-not-call" registry under the Telephone Consumer Protection Act (TCPA), while the FTC only was given the authority to restrict deceptive and abusive practices. The judge held that the FTC overstepped its authority in creating the "do-not-call" list. He did not rule on the constitutional questions surrounding the registry.

Congress acted extremely quickly in response. The very next day, it passed a bill (H.R. 3161) that expressly granted the FTC the authority to implement and enforce the "do-not-call" registry. President George W. Bush signed the legislation on September 29th.

Just as Congress was acting, another judge issued a ruling that directly confronted the First Amendment issues surrounding the registry. Judge Edward W. Nottingham of the United States District Court for the District of Colorado ruled, in *Mainstream Marketing Services, Inc., et. al. v. Federal Trade Commission, et. al.* (No. CIV-03-N-0184) that the FTC's rules were in violation of the First Amendment. Judge Nottingham applied the test set forth in the United States Supreme Court's *Central Hudson* decision, and found the rules amounted to an unconstitutional government restriction on lawful and truthful commercial speech. He ruled that because the registry limited commercial speech, and not political or charitable speech, it was favoring one category

of speech over another solely based on content. The FTC asked for a stay of the decision. It was denied by the District Court, and the Commission appealed to the U.S. Court of Appeals for the Tenth Circuit, which granted a stay. The FTC was allowed to begin enforcement of the list, at least temporarily. The Tenth Circuit heard arguments in the case at the beginning of November.

The FCC, which promulgated its own rules that covered telemarketing calls under its jurisdiction, also began an effort to enforce the registry on October 1st.

### **ANA's Position**

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In 2002, when the FTC issued its Notice of Proposed Rulemaking, ANA filed comments stating our concerns with the rules. We wrote that as a government-controlled registry, with very restrictive rules, the proposal raised First Amendment concerns. Our comments argued that it would make it substantially more difficult and expensive for companies to communicate with both current and potential customers. We noted additionally that the registry was likely to be confusing and frustrating for consumers, because they would continue to receive substantial numbers of telemarketing calls from organizations exempted from the rules. ANA, however, believes that industry and government must find a way to respond to the growing anger and concerns of the public in this area, but that the rules must be drawn in a way that does not undermine the First Amendment.

### **Next Steps**

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ANA is following the case closely as it winds its way through the courts. This case may ultimately have an impact on the definition of commercial speech and the extent to which the government can regulate it. ANA will consider whether to intervene in this case as it heads to the U.S. Supreme Court.

# Unsolicited Commercial E-Mail (Spam)

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## Background

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It was estimated early in 2003 that unsolicited commercial e-mail, or spam, which was not even considered an issue just five years ago, now makes up as much as 45% of all e-mail traffic. It is anticipated that spam will soon pass the 50% mark. Congress and the state legislatures have been under increasing pressure from constituents to “do something” about the rising tide of spam in their inboxes. In response, 36 states had passed various anti-spam bills. We met with our industry allies, including the Direct Marketing Association (DMA), the American Association of Advertising Agencies (AAAA), the American Advertising Federation (AAF), the Magazine Publishers of America (MPA), and other interested groups throughout the year to coordinate an industry response to the issue. This led us to lend our support to some of the legislative proposals that were under consideration in the Congress, including many of the provisions included in the bill finally sent to the President and signed in December. We also met with important policy makers, including Federal Trade Commission Chairman Timothy Muris and Howard Beales, Director of the FTC’s Bureau of Consumer protection, to discuss this issue. ANA took a lead on this issue as an association as well, actively working with the DMA and AAAA to develop our own self-regulatory guidelines for e-mail marketing best practices for our respective members. The self-regulatory guidelines can be found at [http://www.ana.net/govt/what/10\\_14\\_03.cfm](http://www.ana.net/govt/what/10_14_03.cfm).

## Status

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### *Congressional Activity*

Congress was actively engaged on the issue of spam in 2003. Committees in both the House and Senate held numerous hearings on the issue, and a number of bills were introduced to place limits on unsolicited commercial e-mail. All of the bills would have eliminated fraudulent spam by prohibiting e-mails with false or misleading header information and subject lines, but would have imposed penalties of varying degrees. The bills also differed on how to treat legitimate unsolicited commercial e-mail. The following are descriptions of the various key legislative proposals considered in 2003:

### *The Burns/Wyden Proposal (S. 877)*

This bill, the CAN-SPAM Act of 2003, was the main legislative vehicle in the Senate. It passed the Senate by a unanimous vote of 97-0 in October. Introduced in April, it was identical to legislation introduced in a number of previous Congresses by Senator Conrad Burns (R-MT) and Senator Ron Wyden (D-OR), both members of the Senate Commerce, Science and Transportation Committee. It passed in the Senate Commerce Committee in June. This bill prohibited false or misleading header and subject line information and required a clear and conspicuous opt-out. A prior business relationship was required before unsolicited e-mail could be sent. E-mails must be identified as commercial in the text of the message and must contain the physical address of the sender. It also banned harvesting of e-mail addresses or dictionary

attacks. It contained a private right of action for ISPs. The version that passed out of committee called for an FTC study of a “do-not-spam” registry. The bill, however, did not allow for a private right of action and preempted state laws in this area.

### *The Burr/Tauzin/Sensenbrenner Proposal (H.R. 2214)*

Representative Richard Burr (R-NC/5) introduced the Reduction in Distribution of Spam Act of 2003 in May. It was backed by House Energy and Commerce Committee Chairman Billy Tauzin (R-LA/3) and House Judiciary Committee Chairman James Sensenbrenner (R-WI/5). It was the main legislative vehicle in the House. While mostly similar to the Burns/Wyden proposal in the Senate, it differed in a few regards. It had a three-year limit on opt-outs, and required that sexually explicit e-mails contain a warning label, to be designated by the FTC. Criminal penalties were set forth for e-mails without the required warning. The latest version gave the FTC the ability to authorize self-regulatory “best practices” programs. This bill also preempted state anti-spam laws. In addition, while providing greater powers to Internet service providers to sue spammers and increasing the powers of the state attorneys general and the FTC, it did not allow for a private right of action.

### *The Wilson/Green Proposal (H.R. 2515)*

Representative Heather Wilson (R-NM/1) and Representative Gene Green (D-TX/29) introduced their bill, the Anti-Spam Act of 2003, in June. The bill had substantial co-sponsorship, including a significant number of members of the House Energy and Commerce Committee. This fact had led to efforts to merge aspects of H.R. 2515 to H.R. 2214 (the Burr/Tauzin/Sensenbrenner proposal). H.R. 2515 had a stricter opt-out, as it automatically covered all affiliates of a company. Under this bill, opt-outs would have expired after 5 years. It contained stiffer penalties, and did not ban class action suits. It also contained some similar provisions to H.R. 2214, such as requiring a warning label for sexually oriented material, and federal preemption except for falsification of headers and subject lines.

### *The Schumer Proposal (S. 1231)*

Senator Charles Schumer (D-NY) introduced his bill, the SPAM Act, in June. Central to his legislation was the creation of a “do-not-spam” registry, which would be maintained by the FTC. His bill required an “ADV” label for all commercial e-mail, and provided a private right of action for consumers, but prohibited class action lawsuits. It also called for more restrictive labeling for sexually oriented material than other legislation.

### *Other Proposals*

- Representative Zoë Lofgren (D-CA/16) introduced a bill, the REDUCE Spam Act of 2003 (H.R. 1933), which would have required commercial e-mails to have an “ADV” label in the subject line, and an “ADV:ADLT” label if the e-mail is adult-oriented. Lofgren’s bill also included a “bounty hunter” provision that would give a reward to the first person to report a fraudulent spammer to the FTC. Senator Jon Corzine (D-NJ) introduced a version of this legislation in the Senate.

- Senator Orrin Hatch (R-UT) also introduced legislation, the Criminal Spam Act of 2003 (S.

1293), which set prison terms of up to five years for senders of fraudulent spam. The Senate Judiciary Committee held a markup of this legislation in September.

The House passed a compromise version of the Senate's CAN-SPAM legislation in November on a vote of 392-5. It included the provision requiring the FTC to devise a plan for a "do-not-spam" list within six months of enactment, and authorized it to begin implementation nine months after enactment. It also included a provision requiring a report on the practicality of mandating "ADV" labels in the subject line. The Senate made minor technical changes to the bill when it passed the House version, and it passed by unanimous consent in final form by the House in December. The President signed it in December.

### *FTC Activity*

In May, the FTC held a three-day "Spam Forum" to discuss the issues surrounding the rise in spam and to explore solutions to deal with it. Representatives from the technology sector, trade associations, the legal community and the federal and state governments attended. Topics discussed included the economic costs of spam, blacklists, best practices, and federal and state legislation. The forum came on the heels of an FTC report that found widespread deception in the subject line and in the text of a random sample of spam. The FTC survey found, however, virtually no spamming from large national advertisers.

While not taking an official position on the numerous legislative proposals on spam, both FTC Chairman Muris and Bureau of Consumer Protection Director Howard Beales noted that none of the proposals was a "silver bullet," and that a number of legal and technological remedies will be required. The FTC also has questioned the cost, efficacy and safety of a "do-not-spam" list.

### *State Activity*

While 36 states had passed laws regulating unsolicited commercial e-mail by the end of 2003, the most restrictive was passed in September by California. The legislation, SB 186, sponsored by state Senator Kevin Murray (D), would have prohibited anyone from initiating or sending an unsolicited commercial e-mail advertisement from California. It also would have prohibited advertising in an unsolicited commercial e-mail sent to or from a California e-mail address. Fines for violations were as high as \$1 million. Additionally, it contained a private right of action for consumers and allowed actions by ISP's and the state Attorney General. The law contained strict liability provisions that would have led to penalties even if an e-mail were accidentally sent to the wrong recipient.

The bill passed by the U.S. Congress in December preempted all state laws, including the California law.

### **ANA's Position**

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ANA was pleased Congress finally took action in this area. Its action provided a uniform set of national rules that will allow legitimate marketers to contact consumers, while protecting consumers from deceptive, fraudulent spam. We remain opposed to an opt-in regime or a subject line labeling requirement, and any attempts to set up a "do-not-spam" list under the purview of the FTC. There is no reason to believe the bad actors would comply with these types of regulations. A "do-not-spam" list would only hurt legitimate e-mail marketers who

comply with the law, while having no effect on illegal spammers, who already are ignoring state laws in this area.

### **Next Steps**

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Even with the enhanced protections and new enforcement tools provided by the new federal law, the problem of fraudulent spam is not going to be easy to resolve. The anonymity provided by the Internet makes those that break the law in this area virtually invisible. E-mail has become a vital communication tool in our wired age, indispensable to the economic health of the country. Spam could truly be the “killer app” of the Internet. ANA will continue to work actively in this area, to see that the appropriate balance is struck between consumer protection and the ability of legitimate marketers to reach out to the public. Through our self-regulatory guidelines and in our education efforts concerning compliance with the new federal spam legislation, we hope to educate our members and other businesses on the “best practices” of e-mail marketing, to ensure this resource is available for marketers in the future.

# Unsolicited Commercial Faxes

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## Background

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Under the Telephone Consumer Protection Act (TCPA) of 1991, the Federal Communications Commission was granted rulemaking authority over facsimile advertising. At the time, the FCC determined that an “established business relationship” was sufficient for a marketer or advertiser to contact a consumer by fax. In late 2002, the FCC announced plans for a reevaluation of its rules governing unsolicited commercial faxes.

## Status

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In June, the FCC issued a Report and Order revising its telemarketing and facsimile advertising regulations it put in place under the TCPA. Among its rulings, the FCC decided that the established business relationship was no longer sufficient to show that an individual or business has given permission to receive unsolicited commercial faxes. It instead required that prior expressed written permission be obtained from the recipient. This rule was to take effect on August 25th. However, on August 19th, after receiving an outpouring of negative comments about the proposed rule changes, the Commission issued an Order on Reconsideration, delaying the implementation of the new rules (only relating to the insufficiency of the established business relationship) until January 1, 2005. The FCC decided that it was in the public interest to delay implementation to allow organizations to obtain the needed consent from individuals and businesses. It also noted that the extension allows it to consider future petitions and other filings on the issue.

ANA, in conjunction with the American Association of Advertising Agencies (AAAA) and the National Association of Broadcasters (NAB) hired Robert Corn-Revere and Ronald London of Davis Wright Tremaine, LLP, to prepare a Petition for Reconsideration or Clarification to the FCC, stating our problems with the revised rules.

The petition argued that eliminating the established business relationship would have significant adverse consequences, making the most basic fax communication between businesses, and businesses to consumers, more expensive and onerous. It stated that the FCC did not conduct a constitutional analysis of the new rule, and this alone would invalidate its proposal. Additionally, the FCC failed to develop evidence in support of the rule change, nor did it consider any less extensive restrictions. It also noted that the FCC must clarify the rule as it pertains to associations, as the present rule is overly restrictive in this regard as well.

The petition can be viewed on our website, at [http://www.ana.net/govt/what/AAAA\\_ANA\\_NAB\\_petition.pdf](http://www.ana.net/govt/what/AAAA_ANA_NAB_petition.pdf)

Petitions were also filed by the National Newspaper Association and the Newspaper Association of America; the National Association of Business Political Action Committee; and the U.S. Chamber of Commerce, among many others.

## **Next Steps**

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While the FCC's decision to hold off on the implementation of the revised rules has provided some breathing room, the basic issue of obtaining written consent before sending unsolicited faxes remains. ANA hopes that the FCC takes into account our petition, as well as the large number of petitions it received from other groups requesting that the FCC rethink its overly burdensome rule changes. We will keep in close contact with our allies on this issue in the advertising, broadcasting and business communities as the FCC's January 1, 2005 deadline approaches. Working together, we will continue to try to persuade the FCC to develop a less onerous and more balanced approach to this issue.

# Obesity and Food Advertising

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## Background

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The obesity issue in the United States has placed a spotlight on the food advertising issue. Concern about this issue increased substantially after a 2001 report by the Surgeon General found that obesity was the second leading preventable cause of death in the United States. Then in 2002, a number of best-selling books were published claiming the food industry itself was responsible for the problem of obesity. These critics also sought to blame food advertising as a key contributing factor in the increase of obesity in this country. Not surprisingly, their attacks have translated into heightened legislative and judicial activity.

## Status

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In June, New York State Assemblyman Felix Ortiz (D-Brooklyn), for example introduced legislation to raise the state sales tax by 1/4% on foods and drinks, the sale and rental of video computer games and equipment, and the sale and rental of movies. This bill would have imposed a new 1% sales tax on “sweets and snacks” and on movie theater admissions. It would also have prohibited companies from claiming a tax deduction in New York on advertising for food, video games and equipment, and movies and DVD’s on programming directed to children. The bill, A 9145, was introduced on the final day of the legislative session for 2003, and the Assembly took no action on the proposal. However, we expect Assemblyman Ortiz to push his legislation once the Assembly reconvenes next year, as he has been very active on childhood obesity issues.

In addition, a number of states have legislation pending to create commissions to examine the obesity problem. For example, a bill in Maine would have authorized a commission to look into the causes of obesity, including the effect of advertising. However, the New York bill was the first to primarily target advertising.

The American Obesity Association (AOA) set forth a proposal relating to the tax deductibility of food advertising as well. It sent a letter to Food and Drug Administration Commissioner Mark McClellan in September that proposed a three-tier system for the tax deductibility of advertising costs. Their system recommended that advertising for foods of “low or minimal nutritional value” be denied a tax deduction. Advertised foods of “modest or neutral nutritional value” would keep the deductibility, while advertised foods of “high nutritional value” would be given a two-to-one or three-to-one tax credit. The criteria for each category would be determined by existing USDA guidelines. The letter argued that companies would still be allowed to advertise, and consumers would still be able to choose what foods to eat, but attention would be shifted to the promotion of healthier foods. A copy of the AOA’s letter can be viewed at <http://www.obesity.org/subs/advocacy/mcclellanltr.shtml>.

At the federal level, Senate Majority Leader Bill Frist (R-TN) and Representative Mary Bono (R-CA/45) reintroduced their legislation, the Improved Nutrition and Increased Physical Activity Act (S. 1172 and H.R. 716). It would have provided grants to communities for improving nutrition and building recreational facilities, and would have funded a media campaign targeted at young people to encourage healthy lifestyles. The Senate version passed out of the Health, Education, Labor and Pensions Committee in October, but the House version remained in committee.

However, in the House passed conference report for the 2004 Omnibus Appropriations bill, a provision was inserted that appropriated \$1,000,000 “to support a comprehensive review of the effects of food marketing on children’s diet and health, including the characteristics of effective marketing of foods to children to promote healthy food choices.” The study is to be carried out by the Centers for Disease Control and Prevention (CDC), a part of the Department of Health and Human Services. The Senate will not consider the conference report until late January at the earliest.

Also, Senator Mitch McConnell (R-KY) and Representative Ric Keller (R-FL/8) introduced separate legislation (S. 1428 and H.R. 339) that would have limited the types of lawsuits that can be filed against food manufacturers, specifically excluding lawsuits related to obesity. Hearings were held on each bill at the committee level in their respective houses, but no further action was taken on the legislation before Congress adjourned for the year.

In December, Senator Joseph Lieberman (D-CT), one of the nine contenders for the Democratic nomination for President, announced that if elected, he would request the Federal Trade Commission to investigate the food industry’s children’s marketing practices. He would also ask Congress to direct the FTC to devise standards for disclosing health information of foods marketed to children.

Soon after Senator Lieberman took his plan public, ABC aired a special report on obesity in America. Hosted by ABC News anchor Peter Jennings, the major thrust of the report blamed both high government subsidies to farmers and food industry marketing and advertising for obesity in America.

There was significant action in the judicial arena relating to food advertising and marketing as well. The first suit was brought on behalf of two teenagers and alleged that McDonald’s marketing giveaways encouraged them to consume its products, and that McDonald’s failed to discuss adequately the health effects of its products. This case was dismissed, with U.S. District Court Judge Robert W. Sweet holding that it was not the place of the law to protect people from their own excesses. The plaintiffs, however, were given the opportunity to refile.

The second suit alleged that through its advertising campaigns, promotions and public statements, McDonald’s was being misleading about the nutritional aspects of its products and this contributed to the plaintiffs’ obesity. Judge Sweet, however, ruled that McDonald’s advertising was “not objectively deceptive,” nor did he find that McDonald’s actions had caused the plaintiffs’ injury. This case also was dismissed.

A number of cases were brought in California under its Business and Professions Code against food producers and marketers. This law, which was also at the center of the Nike case (see the discussion of this case on page 41), allows individuals to act as attorney general and file suit on behalf of the residents of the state. People for the Ethical Treatment of Animals (PETA) brought two cases under this law in 2003. The first suit was against the California Milk Advisory Board, alleging that the Board was misleading when it said California’s cows were “happy cows.” This suit was thrown out of court. The other suit was brought against KFC, claiming that it was lying about the treatment of its chickens. This suit was eventually dropped by PETA. A suit also was brought against Kraft by an organization called bantransfat.com, which sought to prevent Kraft from selling and marketing Oreo Cookies to children in California because they contained trans fats. The attorney who filed the suit later dropped it, claiming that his intention was just to raise public awareness of the potential danger of trans fats.

Also, a report was published in Great Britain in September that could be used as the basis for further criticism of the food industry. The report was conducted on behalf of Britain's Food Standards Agency, a quasi-government agency that monitors food issues. The report examined the research that has already been conducted concerning children and food marketing. It concluded that there is sufficient evidence that advertising of food to children has an effect on their food preferences, both in what they purchase and what they like to eat. The World Health Organization (WHO) also is in the process of developing a position on food advertising and marketing. This issue will be a central focus of WHO meetings scheduled for January and May of next year.

### **ANA's Position**

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ANA takes the problem of obesity seriously. We continue to urge policymakers to find a balanced approach that includes nutrition education and physical activity. We are on the Executive Committee of the American Council for Fitness and Nutrition (ACFN), a coalition of food producers and manufacturers, associations, and business organizations. The ACFN's mission, as stated on its website at <http://www.acfn.org>, "is to advocate comprehensive, long-term strategies and constructive public policies for improving the health and wellness of all Americans, particularly youth, by promoting science- and behavior-based solutions focused on the critical balance between fitness and nutrition." We remain opposed to any attempts to restrict the ability of food producers and marketers to advertise their products truthfully and non-deceptively.

We also support the development of an advertising campaign by The Ad Council on behalf of the Department of Health and Human Services. This campaign will consist of public service announcements promoting behavioral change to adults through increased physical activity and improved nutrition. ANA's CEO, Bob Liodice, serves on The Ad Council's Board of Directors, as do representatives from many of our member companies.

### **Next Steps**

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The food advertising issue, as long as it is claimed to impact obesity, is likely to remain in the public arena for the foreseeable future. Every day, a new article or study appears that targets obesity as a serious threat to America's health. We also saw in the past year the willingness of those opposed to food marketing to use the courts in an effort to increase public pressure in this area. As a result, we feel there will be a growing focus at the federal level to consider advertising restrictions as part of the "solution" to the obesity problem. This issue also may expand to encompass advertising to children. ANA is committed to working with our partners in the food industry to increase public awareness about obesity and how to treat it, while assuring that all advertising retains its appropriate First Amendment protection.



# Alcohol Beverage Advertising

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## Background

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Alcohol beverage advertising has been perennially controversial. Critics of the alcohol beverage industry attack alcohol beverage advertising, claiming that it over-glamorizes drinking and makes alcohol beverages dangerously appealing to the underaged.

## Status

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A steady flow of critical studies have poured forth from the Center on Alcohol Marketing and Youth at Georgetown University (CAMY), a group receiving multi-millions of dollars in funding from the Pew Charitable Trusts and the Robert Wood Johnson Foundation. In 2002, CAMY issued studies examining the advertising practices of the magazine and television industries, and in 2003, it released reports on the radio industry, alcohol beverage industry responsibility ads, state alcohol advertising laws, and the exposure of minority groups to alcohol beverage advertising. Each of these studies was highly critical of a different aspect of alcohol beverage marketing. Copies of CAMY's reports can be found at <http://www.camy.org>.

CAMY is only one of the groups to make negative statements regarding alcohol beverage marketing in the past year. A number of well-regarded groups have targeted alcohol beverage advertising. The American Medical Association (AMA), for example has recommended that alcohol beverage ads be banned from television before 10pm. Mothers Against Drunk Driving (MADD) has called for alcohol beverage ads to be prohibited from shows that have an underage audience of 10% or greater. The National Center on Addiction and Substance Abuse (CASA) has called for alcohol beverage ads to be taken off television altogether.

Congress continued its pressure on the industry as well. A provision was put in a 2003 appropriations bill directing the Federal Trade Commission (FTC) to conduct a study on malt beverage advertising and its effect on underage consumers.

This report, issued in September, found that adults are the intended targets of malt beverage advertising. The FTC also found no evidence that alcohol beverage companies were targeting underage consumers. It did find, however, that the alcohol beverage industry's self-regulatory standard that at least 50% of an advertisement's audience consists of those of legal age meant that some of its ads for malt beverages were indirectly reaching young people. Despite this fact, the report cited statistics that demonstrated that teen drinking declined between 2000 and 2002, the same period in which malt beverage advertising became more prominent. The report noted that the alcohol beverage industry's self-regulatory procedures have improved since it last examined them in 1999, with the largest improvements in ad placement. The FTC also lauded the industry for recently agreeing to implement a far more stringent 70% standard of adult audience composition for alcohol beverage ad placement. The FTC further noted that the industry had made improvements in ad content, rejecting or modifying ads to reduce their appeal to minors. The Commission urged the industry to continue to develop its self-regulatory procedures and practices. The report can be found on the FTC's website, at <http://www.ftc.gov/opa/2003/09/alcohol.htm>.

Also in September, the National Academy of Sciences (NAS) issued a report on underage drinking that attacked certain aspects of alcohol beverage advertising. While noting that "a clear causal

link” has not been established between advertising and underage drinking, the NAS report made three recommendations regarding alcohol beverage advertising. It urged the alcohol beverage industry to take “reasonable precautions” as to ad placement and content; for the alcohol beverage industry trade associations to strengthen their self-regulatory guidelines concerning ad placement and content; and for Congress to provide funds to the Department of Health and Human Services to monitor underage exposure to alcohol beverage advertising. The NAS report can be viewed on their website, at [http://www.nap.edu/catalog/10729.html?onpi\\_topnews\\_091003](http://www.nap.edu/catalog/10729.html?onpi_topnews_091003).

At a news conference discussing the NAS report’s findings, Representative Lucille Roybal-Allard (D-CA/34) announced her plan to introduce legislation authorizing a youth media campaign targeting underage drinking, one of the report’s recommendations, in the near future. Also attending the news conference were Representative Frank Wolf (R-VA/10), Representative Tom Osborne (R-NE/3), Representative Rosa DeLauro (D-CT/3), Representative Zach Wamp (R-TN/3), and representatives from the American Medical Association, Mothers Against Drunk Driving and the Center for Science in the Public Interest.

In April, Senator Christopher Dodd (D-CT) and Senator Mike DeWine (R-OH) issued a press release that noted their intent to monitor underage drinking trends and the extent to which advertising was reaching young people. After the FTC and NAS reports were issued, Senator DeWine chaired a Substance Abuse and Mental Health Services Subcommittee hearing on underage drinking.

Later in the year, Rep. Osborne, the former head football coach at the University of Nebraska, and Dean Smith, the former head basketball coach at the University of North Carolina, announced they were teaming up with CSPI to convince universities, athletic conferences, and the NCAA to remove alcohol beverage advertising from sports telecasts.

The alcohol beverage industry also had to respond to a class action lawsuit filed against a number of alcohol beverage companies and the Beer Institute in November. It was filed in District of Columbia Superior Court by, among others, the law firm of David Boies, who represented former Vice President Al Gore in the 2000 Florida election recount. The suit claimed a “long-running, sophisticated, and deceptive scheme by certain alcohol beverage manufactures to market alcohol beverages to children and other underage consumers,” the purpose of which was to generate “billions of dollars per year” in additional revenue.

## **ANA’s Position**

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Alcohol beverages are legal products and alcohol beverage ads deserve the full protection afforded all truthful, non-deceptive advertising under the U.S. Constitution’s First Amendment. As the FTC found in its report, the alcohol beverage industry has made significant strides in implementing stringent self-regulatory codes that encourage best practices in advertising. We applaud the industry for revising and strengthening these guidelines. We believe that the 70% adult viewership self-regulatory requirements are more stringent than could be legally required by any legislative mandate due to First Amendment considerations. These efforts, along with tougher penalties for illegal sales to minors and industry sponsored public education campaigns can effectively address the problem of underage drinking without restricting commercial speech.

## **Next Steps**

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With the issuance of so many reports critical of the alcohol beverage industry in 2003, pressure on Congress to act against alcohol beverage advertising remains strong. We will continue to work with Congress, the Federal Trade Commission and industry groups to ensure that the First Amendment rights of alcohol beverage companies remain appropriately protected.



# Tobacco Advertising

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## Background

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Tobacco advertising is one of the most highly restricted advertising categories in the United States. Since the 1998 Master Settlement Agreement between the tobacco industry and 41 state Attorneys General, tobacco advertising has been limited, on a broad voluntary basis. The Federal Trade Commission (FTC) continues to possess regulatory authority over tobacco advertising, although there have been numerous attempts to transfer authority over tobacco products to the Food and Drug Administration (FDA).

## Status

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Again in 2003, legislation was considered to transfer regulatory authority over tobacco advertising to the FDA. Senator Mike DeWine (R-OH), a member of the Senate Health, Education, Labor and Pensions (HELP) Committee introduced this legislation in September. It was similar to legislation introduced in the last Congress by Senator Edward Kennedy (D-MA), formerly Chairman and now ranking member of the Senate HELP Committee. While the FTC would have retained enforcement of current law as it pertains to advertising, the bill would have given the FDA the authority over warning statements that appear on packaging and in advertising. It would have mandated the size and content of warning labels, and would have required tobacco manufacturers to obtain FDA approval of any new statements it wants to place on labels. Tobacco companies would have been required to submit all documents involving marketing research to the FDA. It also would have given wide latitude to the Secretary of Health and Human Services to impose additional restrictions on advertising and labeling, as long as these requirements are consistent with the First Amendment. These proposals were similar to advertising rules that were promulgated by the FDA in 1996. These rules subsequently were found to be invalid by the U.S. Supreme Court, which stated that the FDA had not been given Congressional authority to regulate tobacco products.

This bill was expected to be joined in markup to legislation introduced by Senate Majority Whip Mitch McConnell (R-KY) to provide a so-called \$13.5 billion “buyout” of the tobacco agricultural quota program. The backers of this arrangement hoped that it would have allowed the proposal to gain the support of tobacco state Senators. However, the negotiations to link the bills failed and neither was approved in this session of Congress.

In May, the World Health Organization (WHO) announced that it had reached agreement on an international treaty imposing new regulations on tobacco products. The Framework Convention on Tobacco Control bans tobacco advertising in countries where it is not constitutionally protected, requires tobacco packaging to list all ingredients and prominent health warnings, and encourages higher tobacco taxes. After initially opposing the treaty, Health and Human Services Secretary Tommy Thompson announced the United States had changed its position and was among the 192 countries voting unanimously to pass it. However, it has yet to be considered by the United States Senate, which under the Constitution has the power to ratify or reject treaties negotiated by the Executive Branch.

## **ANA's Position**

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ANA opposes unconstitutionally broad restrictions of truthful, non-deceptive advertising of a product that remains legal to adults over 18 years of age. ANA also feels that the authority over tobacco advertising is best suited to continue under the purview of the FTC, which has the institutional memory and expertise to provide effective regulation. ANA takes no position on tobacco regulation beyond the area of advertising.

## **Next Steps**

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Transferring regulatory authority over tobacco advertising to the FDA could have a dramatic impact on a whole segment of the industry. The FDA's 1996 tobacco advertising rulemaking was widely attacked by legal scholars as diverse as Judge Robert Bork and Lawrence Tribe of Harvard University, and groups such as the American Civil Liberties Union (ACLU) and the Washington Legal Foundation (WLF) as clearly unconstitutional. The U.S. Supreme Court has made clear that tobacco companies have considerable rights under the First Amendment to advertise their products, and we will work with Congress and regulatory groups to ensure these rights are not inappropriately restricted.

# Media Content and Child Protection

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## Background

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Recently, there have been numerous attempts to shield children from sexual and violent content in movies, television programs, music, and video games. This effort has included efforts to limit the advertising that supports these programs and products. From Federal Communications Commission Chairman Newton Minow's characterization of television as a "vast wasteland" in 1961 to Tipper Gore's crusade against music lyrics in the 1980's, critics have blamed the content of entertainment products for America's ills and have sought ways to limit it. Since the Internet became widely available in the mid-1990's, this movement has been extended to the online world.

## Status

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The issue of protecting children from violent or sexual content remained on the Congressional agenda in 2003. Senator Fritz Hollings (D-SC) introduced legislation in the Senate, the Children's Protection from Violent Programming Act (S. 161), to limit the exposure of children to violent imagery. His bill would have recreated and dramatically extended the "family hour" on television, prohibiting the distribution of violent programming during the hours when children are likely to make up a substantial portion of the viewing audience. It would have required the Federal Communications Commission to evaluate the v-chip and content ratings for their effectiveness in protecting children from violent content. The FCC could have assessed penalties up to the revocation of a station's broadcast license for any violations. This bill was identical to legislation Senator Hollings introduced in the past few Congresses. While in past years versions have made it out of the Senate Commerce Committee, it did not receive Committee action or floor attention this year.

In the House of Representatives, Representative Joe Baca (D-CA/43) introduced a bill, the Protect Children from Video Game Sex and Violence Act of 2003 (H.R. 669), that would have banned the sale or rental of video games containing sexual or violent content to children 17 and younger.

The FTC announced in September that it would hold a one-day workshop in late October on the marketing of violent entertainment products to children and industry self-regulation. The decision to hold this workshop came after years of increased Commission activity on this issue. Since 2000, the FTC has issued four reports tracking the status of self-regulation in the entertainment industry. In July 2002, the Commission found that the movie, music and video game industries were making significant progress in advising parents of content through rating information in advertisements and labeling. Additionally, it found that the movie and video game industries were adhering to a pledge to avoid advertising in teen-oriented media, but that some ads for inappropriate entertainment products were still reaching children on television. At the workshop, the Commission heard that the industry was making continued progress in the development of ratings systems. The success of the ratings system for video games maintained by the Entertainment Software Ratings Board (ESRB) was specifically singled out. It also heard that the industry was doing more to prevent access by children to most forms of violent entertainment. The FTC has also provided testimony to Congress on industry self-regulation, and has conducted a public education campaign on the rating systems for movies and video games.

## **ANA's Position**

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The entertainment industry should be permitted to freely promote their products to the appropriate audience. ANA favors private sector initiatives to protect children from inappropriate content, such as the video game industry's self-imposed rating system, as opposed to any legislative remedies. We also have helped facilitate the creation of the Family Friendly Programming Forum, a coalition of over 40 national advertisers that aids in the development of programming suitable for viewing for all ages. The Forum, made up of ANA members, sponsors a scholarship program for college students; a script development fund, which has been able to develop seven programs for network television; and the Family Television Awards, which recognize outstanding family television. More information on the Family Friendly Programming Forum can be found at ANA's website (<http://www.ana.net/family>).

## **Next Steps**

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Even with the announced retirement of Senator Hollings after the 108th Congress, this issue will continue to feature prominently on the Congressional agenda. Senator Joe Lieberman (D-CT), a candidate for the 2004 Democratic Presidential nomination, and Senator Sam Brownback (R-KS), have both joined Senator Hollings as forceful advocates in the past for legislation to restrict media content, and in previous Congresses have introduced separate legislation in this area. We expect these legislators to continue to be at the vanguard of any future legislative battles concerning these issues.

# Product Placement on Television

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## Background

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Product placement is a long-standing and respected tradition on television. It involves the placement of brand-named products in the program and may also show their use by the characters. It is often used to portray characters as normal people who use the same products as the audience. Its use on television is regulated by the Federal Communications Commission (FCC), which requires the identification of a sponsor of product placement material at the time of the broadcast of a program containing a placement.

## Status

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In September, Commercial Alert, an activist group with ties to Ralph Nader, filed a complaint with the Federal Trade Commission (FTC) and the FCC regarding product placement practices on television. The petition asked the FTC and FCC to conduct an investigation and rule making that would require new disclosures. Commercial Alert recommended rules that require identification of product placements, both before a program and a “pop up” disclosure when the product appeared on screen during the program. It argued that disclosing product placements before or after the show was not sufficient, as the audience may not be watching at that time.

The Freedom to Advertise Coalition (FAC), of which ANA is a founding member, sent letters to the FTC and FCC in response to Commercial Alert’s petition, asking them to reject the recommended proposal. FAC’s letter, written by FAC counsel Darryl Nirenberg and Penelope Farthing, argued that Commercial Alert’s proposal is impractical and extreme, and would make television virtually unwatchable by constantly distracting the viewer. It noted that product placement could be an essential ingredient in the program. In the real world, people eat, drink and wear brand name products, and product placement adds to the story being told in a television show. The letter also added that the petition’s proposal is a “Trojan horse” whose true intent is to outlaw a form of commercial speech and infringe on artistic freedom. It ultimately shows a lack of faith in the American public to determine fact from fiction. The letter concluded that the FCC’s current regulations are adequate, and further action is impractical.

FAC’s letter can be viewed on ANA’s website, at <http://www.ana.net>.

## Next Steps

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Neither the FTC nor the FCC has responded to Commercial Alert’s petition. We will continue to monitor developments at both commissions and will also respond to any further developments. We hope that by mobilizing FAC to respond to their request, we will convince the government that new and overly burdensome identification requirements for product placement are unnecessary and intrusive.



# Media Self-Regulation of Advertising

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## Background

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The Federal Trade Commission (FTC) is the federal agency responsible for taking action against false and misleading advertising. In 2002, it issued a report that examined claims made in advertisements for weight loss products in the media. It found that forty percent of advertisements in this category contained one obviously false claim. Subsequent to the issuance of the report, the FTC indicated it would consider taking media companies to court for ads they published or aired containing false claims. It also held a workshop late in 2002 where it explored different approaches to regulation of such claims.

## Status

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In December, the FTC released a guidance to media companies to help them voluntarily screen out false and misleading claims in weight loss ads. The education campaign, called "Red Flag" included the publication of a 19-page reference guide, which identifies many of the most common false and misleading claims. The reference guide can be found at <http://www.ftc.gov/bcp/online/pubs/buspubs/redflag.pdf>.

The FTC would like media companies to institute screening procedures and refuse to run ads that violate these procedures. At the press conference announcing the guidance, FTC Chairman Tim Muris noted that there had already been a drop-off of ads with false and misleading weight loss claims, so the Commission decided the self-regulatory route was sufficient at this time. He did, however, leave the door open for future action by the Commission. He also announced court actions the FTC was bringing against three marketers who made false claims about weight loss products.

## Next Steps

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The FTC said that it hopes to see even more progress by media companies in limiting the publication of false and misleading weight loss claims. All advertisers, of course, already are required to follow stringent requirements about the truthfulness of their claims and the adequacy of substantiation for them. We will continue to carefully monitor the situation.



# Global Developments

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## Background

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ANA is a member of the World Federation of Advertisers (WFA), which consists of 50 national advertising associations, covering five continents, and 30 international advertisers, including a number of ANA members. The WFA works to foster self-regulatory guidelines and practices, in both advertising and marketing, as the best way to protect the freedom of commercial communication and its importance in the global economy. In past years, ANA has worked with WFA on a number of issues affecting advertisers and marketers worldwide, including privacy, advertising taxes, children's advertising, and restrictions on commercial speech. More information on the WFA can be found at <http://www.wfanet.org/>.

## Status

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Specifically in 2003, ANA worked with the WFA to combat the increasing attempts to restrict advertising to children, both in the United States and in the European Union, as a result of the increasing focus on obesity. Some of the more significant proposals in the European Union included:<sup>†</sup>

- Proposals in the French National Assembly to ban advertisements of foods high in fat and sugar during children's programming and including health messages in the advertising of these foods (these proposals were defeated);
- A report in Germany by Verbraucherzentrale Bundesverband, a confederation of German consumer groups urging that advertising during children's programs should be banned, both at the national level and the European Union level, to combat obesity. It also began a campaign to "improve the protection of children and youths from misleading and questionable advertising," which included a lawsuit against Kellogg's over a cereal promotion involving the collection of tokens that can be exchanged by schools for free sports equipment.
- A bill in the Italian Chamber of Deputies that would prohibit children under fourteen from appearing in television and radio advertisements.
- A proposed total ban on direct advertising to children in Norway, which it also planned to introduce to the wider European Union.
- A proposed ban on food advertising during children's television programming in the United Kingdom, introduced by a Member of Parliament from the ruling Labour party. The bill incorporated findings from a report by the Food Standards Agency (FSA), a quasi-governmental body tasked with food issues.

Also, groups in Australia and New Zealand called for restrictions or bans on food advertising

<sup>†</sup>For developments on this issue in the United States, please see the section entitled *Obesity and Food Advertising* (page 26).

to children in those countries as well.

In addition, there were major initiatives put forward by the World Health Organization to restrict tobacco advertising, as well as initiatives in certain European Union countries in regard to alcohol advertising.

### **Next Steps**

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ANA will continue to work with the WFA and our member companies with an international presence to ensure that the rights of advertisers are protected around the world. It is important that we monitor any attempts to restrict advertising in Europe, Australia or New Zealand, as any successful efforts in these or other major world markets have the potential of being exported to the United States. We continue to believe that the self-regulatory guidelines put forth by the National Advertising Division (NAD, <http://www.nadreview.org/>) and the Children's Advertising Review Unit (CARU, <http://www.caru.org/>) of the Council for Better Business Bureaus here in the United States, and by the members of the European Advertising Standards Alliance (<http://www.easa-alliance.org/>), which includes the United States, Canada, South Africa, and New Zealand as well as most European nations, are the best way to insure that advertising remains truthful and non-deceptive.

# Key Court Cases

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## Background

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Every year, ANA systematically follows key court cases at all levels of the judiciary system that involve the First Amendment protection of commercial speech. Over the past three decades, commercial speech protection has been strengthened repeatedly by the courts, and in particular by the United States Supreme Court. ANA has been involved in virtually every major Supreme Court commercial speech case, either as a litigant or through filing *amicus curiae* (friend-of-the-court) briefs.

The following are the major cases impacting advertisers in 2003. We also post regular updates on these cases and others that may be filed on our Legislative, Regulatory and Legal Tracking System in the Government Relations section of ANA's website, at <http://www.ana.net>.

### *Nike, Inc. v. Kasky*

*Nike v. Kasky* was the most important commercial speech case to reach the U.S. Supreme Court in a number of years. Unfortunately, the Court ruled in July that neither the case nor the constitutional questions involved were yet ripe for final judicial action. Instead, the Supreme Court dismissed Nike's writ of certiorari "as improvidently granted." The Court's 6-3 decision did not address the merits of the appeal, but held the Court should not have agreed to hear the case. It sent the case back to the lower courts in California. Rather than continue the legal battle, the parties in this case decided to settle the initial lawsuit brought by Mark Kasky in September. Nike agreed to pay approximately \$1.5 million over three years to the Fair Labor Association to fund worker development programs. But while the case has been settled, the First Amendment issues surrounding it are far from being resolved and cast a shadow over commercial speech in general.

The original lawsuit alleged that Nike, in response to public criticism and to induce consumers to continue buying its products, made allegedly false statements of fact about its labor practices and working conditions in its overseas factories. The case was brought under a provision unique to California law. California's Business and Professions Code allows private citizens to act as if they were the state's attorney general, and bring cases against corporations even though they have not been personally injured. A lower court in California ruled that Nike's statements were noncommercial speech and deserved the greatest level of protection under the First Amendment.

In a 4 to 3 decision, the California Supreme Court disagreed. It decided that because Nike's statements were directed by a commercial speaker to a commercial audience, and because they consisted of factual representations about its own business operations, they were commercial speech for purposes of applying state laws barring false and misleading commercial messages. The case was then remanded to the lower court for further review, but Nike instead appealed to the U.S. Supreme Court. ANA, in conjunction with the American Advertising Federation (AAF) and the American Association of Advertising Agencies (AAAA), filed a "friend-of-the-court" brief with the U.S. Supreme Court in support of Nike and describing the First Amendment protections due commercial speech. Our brief can be found on our website, at [http://www.ana.net/govt/what/Kasky\\_Amicus\\_Brief.pdf](http://www.ana.net/govt/what/Kasky_Amicus_Brief.pdf).

Because of the Supreme Court's refusal to resolve the constitutional issues of the case, advertis-

ers remain under serious threat from the California law. Until this decision is overturned, it means that virtually all forms of a company's communication would likely fall under the definition of commercial speech. This fact is important as commercial speech, while receiving substantial protection, receives less protection than non-commercial speech under the First Amendment. Any time an individual believes that a company has been misleading in its claims made or viewed in California, be it in a press release, interview, advertisement or other public statement, they can bring suit charging a violation of the California Business Code. This situation threatens to create a legal imbalance where critics of companies will receive full constitutional protection of their speech, while the company, if only trying to answer these charges may be confronted by significant lawsuits under California law.

Thus, individuals and groups remain free to file similar cases to *Nike v. Kasky*, such as those listed below:

### ***PETA v. California Milk Advisory Board***

People for the Ethical Treatment of Animals (PETA) filed a lawsuit in San Francisco Superior Court against the California Milk Advisory Board alleging that the Milk Board conducted untrue and misleading advertising when they claimed, "Great Cheese comes from Happy Cows. Happy Cows come from California." PETA believed the advertisements were falsely depicting the lives and "happiness" of California's cows. Superior Court Judge David Garcia threw out the case in late March 2003, holding that government is exempt from the false advertising laws that apply to private individuals.

### ***PETA v. KFC Corporation***

PETA also filed suit in California against KFC Corporation. PETA claimed that KFC made false and deceptive statements in its public relations campaign in defense of allegations by PETA regarding the condition of KFC's chickens. PETA, however, dropped the suit in September 2003.

### ***Bantransfat.com, Inc. vs. Kraft Foods North America***

In May 2003, Stephen Joseph, a San Francisco attorney, filed suit in Marin County (CA) Superior Court against Kraft Foods, the producer of Oreo cookies. The lawsuit sought to order Kraft to stop marketing and selling Oreos to children, due to the presence of trans fats, a man-made saturated fat. Mr. Joseph dropped the suit two weeks later, claiming that his intent was only to increase public awareness about trans fats and that this public information purpose had been achieved.

## **Other Key Cases**

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### ***Congress of California Seniors v. Pharmacia Corporation et al.***

Pharmacia was sued in Los Angeles Superior Court over a journal article published in the Journal of the American Dental Association written by an advertising firm hired by Pharmacia and Pfizer about one of its prescription drugs, Bextra. The article promoted the "off label" use of Bextra in the treatment of acute pain, which was approved by the Food and Drug adminis-

tration only for treatment of osteoarthritis, rheumatoid arthritis and primary dysmenorrhea. Again, the plaintiff's used California's Business and Professions Code to bring suit against Pharmacia and Pfizer, arguing that their actions in trying to promote Bextra were deceptive and the statements made by the third party were false and misleading. The defendants argued that the article was protected as an appropriate exercise of free speech and that allowing such an unfounded suit to proceed would have suppressed free speech in important medical journals as well as the First Amendment rights of the companies sued.

Fortunately, the court agreed, because the case was thrown out in December. The Judge in the case, Superior Court Judge Victor H. Person, found that the Plaintiffs failed to establish a prima facie case. Moreover, he found that the evidence presented by the Plaintiffs actually bolstered the Defendants' case.

While the Judge's ruling in this case clearly is a victory for the rights of advertisers, we still need to remain on guard. The First Amendment issues in the *Nike* case have not been resolved. We expect more cases to be filed in California that will exploit the uncertainty created by the ruling of the state's highest court in that case.

### *Eller Media Company v. City of Cleveland*

This important, long-running case was finally resolved, to the benefit of the advertising world, in 2003. In April, the U.S. Court of Appeals for the Sixth Circuit struck down Cleveland's ordinance prohibiting most outdoor advertising for alcohol beverage products. In doing so, it cited the U.S. District Court for the Northern District of Ohio's contention that Cleveland's attempt to limit outdoor alcohol beverage advertisements "serves to prohibit the advertising of alcoholic beverages in areas where it is otherwise legal to do so." The decision also stated that the ordinance was contrary to a number of U.S. Supreme Court decisions, including the *Central Hudson* and *Lorillard* decisions. Cleveland had tried to distinguish *Lorillard* by claiming their restrictions were more "narrowly tailored" and that they had provided more evidence supporting the need for and the benefit of these restrictions to protect children, but the District Court disagreed, calling the ordinance "nearly a complete ban" on truthful information about a legal product.

ANA filed a "friend-of-the-court" brief with the Court of Appeals in this case. Our brief, written by Steven Brody of King & Spalding, argued that the ban was an unconstitutional censorship scheme that inappropriately burdened the ability to reach adult consumers about a legal product. Fortunately, the Appeals Court reached the same conclusion.

### *Pelman, et al. v. McDonald's Corporation*

In another extremely important case dealing with food marketing and advertising, United States District Judge Robert W. Sweet granted McDonald's motion to dismiss a lawsuit alleging that the company had hidden information from consumers in their advertising and marketing about the health aspects of their food offerings in September. This suit was a follow-on to an earlier case that had been dismissed in January.

In the original complaint, the plaintiffs (two teenage girls) alleged that McDonald's, through their marketing techniques, such as toy giveaways, geared their advertising campaigns to induce children to purchase and eat their products. Their complaint further stated that McDonald's failed to disclose the ingredients or health effects of consuming its products in its

advertising or labeling, instead marketing products that were physically and psychologically addictive. Judge Sweet dismissed this complaint, stating that “If a person knows or should know that eating copious orders of supersized McDonald’s products is unhealthy and may result in weight gain (and its concomitant problems) because of the high levels of cholesterol, fat, salt and sugar, it is not the place of the law to protect them from their own excesses. Nobody is forced to eat at McDonald’s.” He did, however, allow the plaintiffs to refile.

Their second complaint alleged that McDonald’s, through its “widespread advertising campaigns, ‘consumer oriented’ statements, promotions, brochures, press releases and statements,” and on its Internet web site and in its restaurants, was misleading about the nutritional value of some of its products, including its Chicken McNuggets and french fries. Judge Sweet ruled that the advertising campaign upon which they relied was “not objectively deceptive,” and the complaint stated a conclusion to that effect without facts to demonstrate and support these allegations. Judge Sweet also found that they had not sufficiently proved that McDonald’s products and actions caused them injury. He denied the plaintiffs leave to file another amended complaint.

### *Price and Fruth v. Philip Morris Incorporated*

This class action suit against Philip Morris alleged that it was deceptive in the marketing of its “light” and “lowered tar and nicotine” products. The complaint contended that these representations were materially false because the members of the class did not actually receive lower tar and nicotine. The Circuit Court for the Third Judicial Circuit in Madison County, Illinois found for the class, stating that Philip Morris “intended to deceive consumers into believing that Marlboro Lights and Cambridge Lights cigarettes were less harmful or safer than their regular counterparts. On March 21, 2003, Circuit Judge Nicholas G. Byron ordered Philip Morris to pay \$7.1 billion in compensatory damages and \$3 billion in punitive damages. He ordered Philip Morris to pay a \$12 billion bond to stay enforcement of the verdict. In response to a request from Philip Morris, the judge later reduced the size of the bond and stayed execution of the verdict. Philip Morris has appealed to the Illinois Supreme Court, and the court has agreed to hear the case.

### *Missouri v. American Blast Fax, Inc.*

In a decision considering the FCC’s actions in regard to faxes in 2003, the Eighth Circuit Court of Appeals unanimously upheld the federal ban on unsolicited commercial faxes in March. The Appeals Court decided that the portion of the Telephone Consumer Protection Act dealing with unsolicited faxes directly advanced the government’s interest (a key part of the U.S. Supreme Court’s *Central Hudson* test) by preventing fax advertisers from shifting the costs of sending faxes to the recipient, who must pay for the materials and time involved in receiving them. This ruling reversed a decision by a District Court judge in Missouri last March that overturned a portion of the Telephone Consumer Protection Act. The District Court had rejected the state’s argument that unsolicited fax advertisements pose a serious problem, and found that the blanket ban on unsolicited faxes violated the First Amendment. It also had decided that the Act goes too far in limiting commercial messages that are authentic (see also the discussion of the FCC’s regulatory actions in regard to faxes on page 23).

### *Bell South Advertising & Publishing Corporation v. Tennessee Regulatory Authority*

Bell South Advertising & Publishing Corporation (BAPCO) challenged rulings by the Tennessee Regulatory Authority (TRA) that required it to display the names and logos of competing telephone companies on the cover of the directories it published for its affiliated phone company, Bell South Tennessee (BST). In February 2001, the Tennessee Court of Appeals reversed the rulings of the TRA, stating that the orders “imposed ‘forced speech’ upon BAPCO in violation of the First Amendment.” However, the Tennessee Supreme Court later reversed the lower court’s ruling, stating that the orders did not violate the First Amendment. It rejected the U.S. Supreme Court’s decisions in both *Central Hudson* and *United Foods*, and instead applied the lesser standard for compelled speech set forth in the U.S. Supreme Court’s *Zauderer* decision, which required the Tennessee Supreme Court to determine “whether the TRA’s disclosure requirement was reasonably related to the state’s interest in preventing deception of consumers,” and “whether the disclosure requirement is unduly burdensome.” It held that the TRA’s requirements met this test. BAPCO filed a petition for writ of certiorari with the U.S. Supreme Court in November 2002. The U.S. Supreme Court denied cert in February.

### *Ashcroft v. ACLU*

On March 6, 2003, the U.S. Court of Appeals for the Third Circuit again ruled against the government in this important commercial speech case. The Court was hearing the case on remand from the U.S. Supreme Court, which had held that the Child Online Protection Act’s (COPA) reliance on community standards to identify material “harmful to minors” did not render it *per se* unconstitutional. In its most recent ruling, the Appeals Court held that COPA was not sufficiently narrowly tailored to withstand the Court’s strict scrutiny test. 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-on 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).

ANA filed an *amicus* brief with the U.S. Supreme Court in this case. Our brief urged the Court to make clear that the government may not treat commercial enterprises as if they were second-class citizens deserving of receiving substantially less protection under the First Amendment.



# Coalitions

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ANA remains an active and influential member of the Advertising Tax Coalition (ATC); the Freedom to Advertise Coalition (FAC); the State Advertising Coalition (SAC); and the Coalition for Health Care Communication (CHC). We also recently joined the American Council for Fitness and Nutrition (ACFN). These coalitions enhance the efforts of the diverse groups that share the common interest of protecting the rights of advertisers. They provide the industry with a united front when lobbying Congress and government agencies, and serve to strengthen our individual efforts.

## *Advertising Tax Coalition*

The Advertising Tax Coalition (ATC) was established in 1988 to direct the fight against federal advertising tax proposals. There are currently eight 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); and the Newspaper Association of America (NAA). In its efforts to prevent ad tax proposals, the ATC meets with members of the tax-writing committees in Congress to educate leaders on the value of advertising and the importance of not undermining this key engine of the economy through taxation. In 2003, ATC was heavily involved in the debate over various proposals in both Houses of Congress to limit the tax deductibility of direct-to-consumer prescription drug advertisements.

## *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); Point of Purchase Advertising International (POPAI) and the Direct Marketing Association (DMA).

Since the formation of FAC in 1987, its efforts have been successful against government agency and congressional proposals to restrict advertising. In 2003, FAC has been instrumental in resisting limits on tobacco advertising, opposing regulations and legislation against direct-to-consumer prescription drug advertising, and in responding to a petition by Commercial Alert regarding product placement on television (see page 35 for more information).

## *State Advertising Coalition*

The ANA, The American Association of Advertising Agencies (AAAA), and the American Advertising Federation (AAF) formed the State Advertising Coalition (SAC) in 1986 to provide information and resources necessary to combat overly restrictive state and local advertising proposals. Since its formation, SAC has responded to more than 100 ad tax proposals in over 40 states. In 2003, these efforts continued to grow as we faced significant battles in a record number of states (see page 7 for a discussion of these proposals).

### *Coalition for Healthcare Communications*

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

The members that form the CHC include the ANA; the American Association of Advertising Agencies (AAAA); the American Advertising Federation (AAF); American Business Media; the American Medical Publishers Association (AMPA); 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). More information about the CHC can be found at <http://www.cohealthcom.org>.

### *American Council for Fitness and Nutrition*

The American Council for Fitness and Nutrition (ACFN) was formed in 2003 to respond to the challenges posed by obesity and overweight in the United States. Its mission is to “advocate comprehensive, long-term strategies and constructive public policies for improving the health and wellness of all Americans, particularly youth, by promoting science- and behavior-based solutions focused on the critical balance between fitness and nutrition.” The ACFN does this through advocating this position to federal and local officials, promoting activities by members that encourage consumers in reaching the correct balance between fitness and nutrition, engaging in ventures with public and private entities to promote fitness and nutrition programs, and supporting scientific research that looks into achieving a balance between fitness and nutrition.

The ACFN has over 50 members, including food and beverage manufacturers, restaurant chains, and trade associations representing a variety of industries involved in the production and marketing of food products. ANA is on the ACFN's Executive Board. More information about the ACFN can be found at <http://www.acfn.org>.



