

2005 Compendium of Legislative, Regulatory, and Legal Issues



Leading the Marketing Community

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This Compendium covers legislative, regulatory and legal issues tracked by ANA's Washington, DC office from January 1 to December 31, 2005.

Introduction

The Washington, D.C. office of the Association of National Advertisers (ANA) has confronted a number of serious legislative, regulatory and legal challenges to advertising in 2005. There was significant activity on a broad range of issues, including: increased attacks on food marketing and children's marketing; attempts to limit advertising for other product categories, including DTC prescription drug advertising, alcohol beverage advertising and tobacco advertising; attacks on product placement and other marketing venues, such as commercial faxes. We have also been involved in a number of battles in the courts over the First Amendment rights of all marketers. Finally, we have begun preparations for the next round of contract negotiations with the talent unions; the current contracts expire next year.

The advertising community faces a more complex and challenging political environment. Many policymakers have a very negative view of the role of advertising in our society. For example, at an advertising conference in April, Senator Tom Harkin (D-IA) made the following comments about children's marketing: "We are exploiting our children. We are pouring acid on their innocence." In a speech to the Media Institute in May, FCC Commissioner Jonathan Adelstein stated: "We are in the midst of a tremendous wave of commercialism in our media and in our culture . . . Nobody suggests anything good comes from marinating children's brains in advertising."

Consumers are also pushing back aggressively against unwanted commercial messages, through do-not-call, do-not-spam, do-not-fax, and commercial blocking technologies such as TIVO.

The growing hostility of both consumers and policymakers to broad segments of advertising poses a serious challenge to marketers in all media environments and at all levels of government.

Following is a summary of the most significant challenges we have faced in 2005.

- **Obesity, Food Marketing and Children's Marketing:** ANA has taken a leadership role in responding to the critics who blame food marketing for increased rates of childhood obesity. We helped form the Alliance for American Advertising (AAA), a coalition of industry groups and food and beverage companies that is working to encourage private sector efforts to address the obesity challenge. In January, we testified at an Institute of Medicine (IOM) workshop on food marketing. In July, we took part in a very important workshop cosponsored by the Federal Trade Commission (FTC) and the Department of Health and Human Services (HHS). We also responded to an IOM report calling for Congressional action regarding food advertising. As founding members of The Ad Council and the Children's Advertising Review Unit (CARU), we worked with industry partners to strengthen and enhance the efforts of the advertising community to respond to the obesity challenge.
- **Direct-to-Consumer Prescription Drug Advertising:** There were continued attacks on DTC advertising this year, with legislation introduced in Congress to deny the

deductibility of DTC marketing costs. Just before the July recess, Senate Majority Leader Bill Frist (R-TN) called for a two-year moratorium on all DTC advertising for new drugs. Legislation to write a two-year moratorium into law was introduced in the House by Congressman Sherrod Brown (D-OH). We also helped defeat an amendment introduced by Senator Ron Wyden (D-OR) that would have required the government to deduct the cost of DTC advertising from its purchases of prescription drugs under Medicare, Medicaid, and other programs. The Senate Aging Committee held a hearing on DTC advertising in September, and the FDA held a two-day workshop on it in November. Congressman Jim Moran (D-VA) introduced legislation to restrict drastically the hours during which ads for ED drug products could be broadcast. ANA works closely with our member companies and other industry groups to protect the ability of pharmaceutical companies to communicate effectively with consumers. We have met with key members of Congress to provide them with information about the value of DTC advertising. We are demonstrating that this advertising is saving lives and improving health for millions of Americans.

- **State Advertising Taxes:** There were advertising tax proposals in seven states this year. The most serious threat was in Texas, where the legislature held two special sessions to address school finance issues. Very late in the year, a new threat developed in Pennsylvania. We worked closely with our member companies and local industry groups to defeat ad tax proposals as a revenue source for school funding.
- **Legal Developments:** ANA filed “friend of the court” briefs in two California court cases involving tobacco advertising that would set a very dangerous precedent for other product categories. We are also planning to file a friend of the court brief in a challenge to Utah’s email registry program. We held our first Advertising Law and Business Affairs conference in New York City in January and are currently planning for next year’s conference. We held several meetings of ANA’s Legal Affairs Committee, which was formed in 2004 to address various legal issues facing marketers. Given the turnover on the U.S. Supreme Court and the increased number of marketing cases in the courts, our efforts to enhance the First Amendment protections for all marketing are increasingly important.
- **Unsolicited Commercial Faxes:** ANA was part of a successful industry effort to enact legislation to overturn an FCC rule on sending unsolicited commercial faxes. The FCC rule would have required marketers to obtain the prior written consent of a consumer before sending any commercial fax. The legislation allows marketers to continue to send commercial faxes to persons with whom they have an established business relationship as long as they provide an ability to opt out of such messages. California passed legislation more restrictive than the federal bill in October, and we have asked the FCC to determine if the state law is pre-empted. A law suit against the California restrictions on faxes is also pending.
- **Privacy and Information Security:** A number of high profile data breaches have refocused attention on how companies collect and use information about consumers. We are working closely with our member companies and other industry groups to develop responsible approaches to these problems while

opposing any legislation that would impose unreasonable or costly burdens on the information collection practices of marketers.

- **Talent Contract Negotiations:** ANA and the American Association of Advertising Agencies (AAAA), through the Joint Policy Committee (JPC), help to develop the advertising community's position in regard to the talent contracts with SAG/AFTRA and the American Federation of Musicians. ANA also provides the funding for the chief negotiator for the industry, Doug Wood. These labor contracts, which are among the largest in the nation, expire next year, and we have begun meetings to discuss a variety of major new issues that will have to be addressed during the coming negotiations.

This is just a brief summary of the issues we have confronted this year. More details can be found in the pages that follow. We also continually post updates on these and other issues at the Government Relations page on our website at www.ana.net

If you have any questions about these issues, please contact ANA's Government Relations office at (202) 296-1883.

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Changes on the United States Supreme Court

With the death of Chief Justice William Rehnquist and the retirement of Sandra Day O'Connor, the Supreme Court had its first vacancies in over 11 years. Not since the early 1970's have there been two vacancies on the Court in the same year. These developments provided President George W. Bush his first opportunity to appoint Supreme Court justices. The end result may be a marked shift in the Court's views on a number of Constitutional issues, such as the interpretation of the commerce clause and the extent to which the Constitution guarantees a right of privacy.

An important issue for the advertising industry is how a reshuffled court will view commercial speech rights under the First Amendment. In virtually every commercial speech case (except those dealing with lawyer advertising), Justice O'Connor was a consistent voice in favor of granting advertising broad protection under the First Amendment. The late Chief Justice, however, was often on the opposite side, including a notable dissent in *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976), the first Supreme Court case to recognize a First Amendment protection for advertising. Chief Justice Rehnquist had over time, however, become more supportive of commercial speech rights under the First Amendment.

New Chief Justice John G. Roberts, Jr. was sworn in as the 17th Chief Justice in time for the Court's 2005 session, which began on October 3. Chief Justice Roberts' views on commercial speech, however, are not yet clear. Interestingly, in 1998, he was counsel of record on a "friend-of-the-court" brief for the American Gaming Association in *Greater New Orleans Broadcasting Assoc. v. United States*, 527 U.S. 173 (1999). The brief argued that the prohibition of broadcast advertisements for lawful private casino gambling violated the First Amendment based on the Supreme Court's four-part test established in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). The court, in a unanimous decision, agreed with this view. Of course, as Chief Justice Roberts noted during his confirmation hearings, his views in such briefs were often those of his clients and are not necessarily his own.

President Bush has nominated Samuel A. Alito, Jr., a judge from the Third Circuit Court of Appeals, to fill the Court's second vacancy. As with Chief Justice Roberts, his views on commercial speech are not yet clear. In 2003, he authored an important decision in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), which struck down a Pennsylvania statute barring alcohol beverage advertisements from university-affiliated media. Judge Alito wrote, applying the *Central Hudson* test, that the statute did not directly advance the government's interest since it targeted a narrow sector of media. He also found the bill too broadly tailored since it prevented the communication of truthful, non-deceptive information about legal products to adults. While this may provide some insight into his position on commercial speech, it is also true that he was bound by prior Supreme Court precedent.

The seat to which Judge Alito has been nominated is vitally important to the advertising community. Justice O'Connor was often the key swing vote in many of the Court's 5-4 decisions in recent years, which included cases involving commercial speech. In *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), Justice O'Connor

authored an important opinion broadly defending commercial speech rights. Her opinion held that Food and Drug Administration (FDA) restrictions on advertisements for compounded drugs violated the First Amendment. Based on the Supreme Court's test from *Central Hudson*, the Court found that the government had not proved the regulations were "no more extensive than necessary." Justice O'Connor wrote that, "If the First Amendment means anything, it means that regulating speech must be a last - not first - resort."

Justice O'Connor also wrote the opinion for a highly divided court in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). In that case, the court held that Massachusetts regulations that imposed a ban on most outdoor and point-of-sale advertising for tobacco products violated the First Amendment and were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). The Court's decision in this case set an important precedent that has affected a number of lower court cases.

It is difficult to predict at this time what will be the next major case or cases that are likely to come before the Supreme Court in the commercial speech area. Nevertheless, these cases will have greatly heightened focus and importance as they likely will provide the critical clues as to where the Supreme Court will head in regard to commercial speech in the future.

Almost certainly, Chief Justice Roberts and, should he receive Senate approval, Associate Justice Alito, are likely to play a key role in solidifying the Court's direction in regard to commercial speech for years to come.

Next Steps

In light of the importance of these developments, ANA will continue to take a lead in efforts to solidify the major gains that commercial speech protection has been able to attain under the protection of the First Amendment during the last few decades.

Advertising Tax Deductibility

Background

Advertising has traditionally been deductible as a business expense at the federal level. This exemption is extremely important for the ad community. ANA consistently has explained the critical importance and value of ad deductions to policymakers at the state and federal level. The last time the advertising industry faced an across-the-board advertising tax at the federal level was in the George H.W. Bush administration. ANA, however, faces a number of battles each year at the federal level in regard to product-specific categories. We also face ad tax proposals in a handful of states each year (which are discussed in full on page 9). We have worked with other members of the advertising community as part of The Advertising Coalition to prevent the disallowance of ad deductions from becoming a part of the federal tax code.

In 2004, The Advertising Coalition released a report by Global Insight, a major economic think tank, that demonstrated the importance of advertising to the economy. The report, carried out by Dr. Lawrence Klein, a Nobel laureate in economics, and a team of other noted economists, found that the more than \$278 billion projected to be spent on advertising in the U.S. in 2005 will produce more than \$5 trillion in economic activity out of a total of \$21 trillion in total sales. Additionally advertising's impact on job generation throughout this country is at least as important. According to the study, advertising will generate over 21,117,903 jobs in the United States in 2005, which is 15.2 percent of the U.S. job total. The study provided highly valuable ammunition in our fight to preserve advertising's business deduction.

Status

The two areas where we faced ad tax proposals on the federal level in 2005 pertained to prescription drug advertising and tobacco advertising.

Unlike last year, none of the drug reimportation bills contained provisions to deny ad tax deductions. There were two other bills, however, that dealt with the tax deductibility issue in the House. One was sponsored by Representative Jerrold Nadler (D-NY/8), which would have denied the ad deduction entirely for prescription drugs. The other bill was sponsored by Representative Michael Michaud (D-ME/2), which required the Secretary of Health and Human Services to negotiate rebate agreements with drug manufacturers to reduce the price of prescription drugs for patients without access to discounted drugs. If drug companies failed to enter these agreements, they would be denied the ad tax deduction.

In the Senate, Senator Tom Harkin (D-IA) has a bill, the Healthy Lifestyles and Prevention America Act (or HeLP America Act, S. 1074), that denies the tax deduction for tobacco advertising.

Next Steps

ANA knows attempts to restrict ad deductibility for "controversial" advertising categories will persist at the federal level. Advertising's critics see it as a way of controlling

advertising they do not like and do not want to be available to children or other segments of the public that are perceived as particularly vulnerable. Our critics often ignore, however, that commercial speech is afforded significant First Amendment protection. An arbitrary restriction on protected speech based solely on the content of the speech would undoubtedly be found unconstitutional under the First Amendment. We will fight any product-specific ad tax proposals that are put forward in the Congress. With the long term economic impact of the past summer's hurricane season not fully known and the continuing war in Iraq substantially increasing the federal deficit, we must remain on guard for an across-the-board ad tax proposal to surface. Pressure to find sources of revenue are likely to make some in the Congress look covetously at the approximately 70 billion dollars ad taxes would raise annually. When lawmakers are looking for new ways to raise revenue, they often go down the list from A to Z. Unfortunately, advertising is right up at the top of the list.

State Advertising Taxes

Background

Over the last 20 years, ANA has worked to defeat over 120 ad tax proposals in more than 40 states. While the economic outlook for most states has improved since the 2001 recession, some states still see ad taxes as a way to raise revenue for certain programs, particularly education. ANA is a founding member of the State Advertising Coalition (SAC), which works with marketers and other industry groups to oppose ad tax proposals. Our membership in The Advertising Coalition has also been instrumental in this fight.

Status

The advertising community faced advertising tax threats in seven states in 2005. Texas remained the most serious battleground, but we also faced a late-year ad tax threat in Pennsylvania.

Texas

The Texas Legislature has been grappling with school finance issues for several years and faces a court order to revamp the state's school funding laws. In 2003, the Texas Senate passed a school finance bill that would have increased the sales tax rate by one percent and imposed it on almost all services in the state, including advertising. That bill died in the House of Representatives. A very contentious special session on school finance issues in 2004 ended without any agreement. During that session, the House had approved a plan to increase the tax rate and apply it to all billboard advertising and certain newspaper ad inserts.

This year, the Texas Legislature was once again unable to reach any agreement on school finance issues, during the regular session and two special sessions. During the regular session, the House passed a bill that would have raised the sales tax by one cent and imposed it on all billboard advertising. A tax on all advertising in all media had also been discussed during House deliberations. ANA worked closely with our member companies and local industry groups, including the Texas Association of Broadcasters, to oppose any tax on advertising. School finance issues remain unresolved -- the second special session adjourned on August 19th without any agreement.

Following is a summary of advertising tax proposals in other states:

Arkansas

A bill to tax all advertising time and space in all media was introduced in the Arkansas House of Representatives by Representative Johnnie Bolin. HB1419 was referred to the Revenue and Taxation Committee, which did not act on the bill. The bill was withdrawn by the sponsor on March 31st.

Florida

Three former elected officials – former Senate President John McKay, former Comptroller Bob Milligan and former Attorney General Bob Butterworth – have submitted three proposed constitutional amendments on taxes to the Florida Supreme Court. The amendments would require the Florida Legislature to review all sales tax exemptions by

July 1, 2008 and every ten years thereafter. An exemption could only be reenacted in a “single subject” bill containing a legislative finding that the exemption served a specific public purpose. The Florida Supreme Court threw out a similar proposal last year, concluding that the amendment violated the state’s single-subject rule for constitutional amendments and did not adequately inform voters of the consequences of the amendment. If the Florida Supreme Court approves the text of the amendment this time around, the supporters of the proposal will have to gather 500,000 additional signatures from Florida citizens by next August before it can appear on the 2006 ballot. The text of the proposal is available at the home page of Floridians Against Inequities in Rates (FAIR), at www.fairamendment.com. ANA will be following this matter closely as Florida was once ground zero for advertising taxes. In 1987, the Florida Legislature passed a broad tax on all professional services, including advertising, but repealed it six months later after considerable industry lobbying.

Maine

Property tax reform is a major issue in Maine. Two bills were introduced in the Maine Legislature this spring that would expand the sales tax base to a number of business services, including advertising. LD1587 was introduced by Representative Benjamin Dudley, a member of the Joint Property Tax Reform Committee. LD1595 was introduced by Senator Joseph Perry, Chair of the Joint Taxation Committee. The Joint Taxation Committee held hearings on the bills in May. The legislature adopted a budget and adjourned its regular session, and despite some speculation that Governor Baldacci would call a special session in the fall to address tax reform, that did not come to fruition. ANA is working closely with the Maine Association of Broadcasters and other industry groups to oppose any tax on advertising.

New York

A product specific ad tax bill was again introduced in the New York State Legislature. Assembly Bill 5665, introduced by Assemblyman Felix Ortiz (D-Kings County), would prohibit companies from claiming a tax deduction in New York on advertising for food, video games and equipment and movies and DVDs when the advertising is shown on television shows primarily watched by children under 18. It would also raise the state sales tax by % on foods and drinks and the sale and rental of video computer games and movies, as well as imposing a new 1% sales tax on “sweets and snacks” and movie theater admissions. The revenues raised would be used for various childhood obesity programs. The bill was referred to the Assembly Ways and Means Committee, which has taken no action on the proposal. ANA is working closely with food company members and other industry groups to oppose advertising taxes as a response to concerns about childhood obesity.

Oregon

Representative Terry Beyer introduced legislation (House Bill 3390) that would have imposed a gross receipts tax on all broadcast advertising sold in the state of Oregon. Proceeds would have been dedicated to public broadcasting operations. The bill was referred to the House Revenue Committee and the Ways and Means Committee and died when the legislature adjourned in August. ANA wrote to the members of those committees to express our opposition to this legislation.

Pennsylvania

In late December, the Pennsylvania House of Representatives passed a property tax relief bill that would broadly expand the current 6% sales tax to cover advertising and a number of other business services. The Senate held hearings on the bill in mid-January 2006. Some legislators have claimed the bill targets advertising in retaliation for extensive media coverage of the legislature giving itself a 16% pay hike in July.

ANA's Position

An advertising tax, whether federal or state, across the board or product specific, sends an anti-business signal. As demonstrated by the Global Insight study, advertising is an important part of the economy, providing a boost in consumer spending and creating jobs in related industries. If advertising is made more expensive, there is less of it, undermining incentives for business activity. This creates further cascading effects. When advertising decreases, consumer demand for products also declines. Companies in turn sell less, forcing them to cut back on hiring, which ends up hurting the state in the end. Many states, most notably Florida and Connecticut, have discovered that advertising taxes are both bad for the economy and impossible to administer.

Next Steps

The fiscal position of many states has improved dramatically. We were very fortunate in warding off a number of significant ad tax proposals in the past four years. Advertising taxes remain possible in a number of states every year, particularly states that face school finance reform challenges such as Texas. Also, several states are still reeling from the economic impact of Hurricanes Katrina and Rita and, therefore, may be looking for new revenue sources. We will continue to work to educate state leaders on the benefits of advertising to the economy.

Food Advertising and Obesity

Background

In 2001, the Surgeon General identified obesity as the second leading preventable cause of death in the United States. The Surgeon General's report, while listing a large number of proactive steps to counteract obesity, failed to even mention advertising as a cause. Nonetheless, a broad range of critics have attempted to single out advertising as a primary cause of the growth of obesity. Not surprisingly, these attacks have led to increasing scrutiny for food advertising by Congress and the Federal government.

Status

In January, the Institute of Medicine (IOM) held a workshop on "Marketing Strategies that Foster Healthy Food and Beverage Choices in Children and Youth." ANA testified at the workshop, describing how the food industry and advertising community is responding to concerns about obesity. We noted how numerous companies have responded in the marketplace to concerns about obesity by developing menu alternatives and serving size changes. These product innovations can only be successful if companies have the ability to communicate with consumers through advertising. We also described how the advertising community is responding through the efforts of The Ad Council and our self-regulatory system, the Children's Advertising Review Unit (CARU). This system, backed up by the Federal Trade Commission (FTC), is a model of effective industry self-regulation. Our testimony can be viewed at http://www.ana.net/news/2005/01_28_05.cfm.

Unfortunately, not everyone found CARU's efforts adequate. Senator Tom Harkin (D-IA) resumed his criticism of industry self-regulation, most notably at April's Government Affairs conference of ANA, the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF). In his speech, Senator Harkin stated his belief that while CARU's done some good, it's "not cutting it" and it has "no legal authority and no teeth." He argued that the First Amendment would allow substantial restrictions to be imposed on food advertising. Senator Harkin claimed that it was not realistic to require parents to protect their children from food ads, as these efforts are being undermined by the "barrage" of food ads. Harkin called on industry to meet with critics such as the Campaign for a Commercial Free Childhood, the Center for Science in the Public Interest (CSPI) and the American Psychological Association (APA) to work out guidelines for marketing to children. He was very critical of the current advertising environment, calling it "toxic" and compared it to "throwing acid" on the psychological development of children.

After his speech, Senator Harkin introduced legislation to authorize the FTC to utilize the concept of unfairness issue rules regarding marketing to children under 18 if it determines the consumption of certain foods and beverages is detrimental to the health of children, or if it determines advertising to children is false or deceptive. His bill, the Healthy Lifestyles and Prevention America Act (or HeLP America Act, S. 1074), would restore the FTC's unfairness rulemaking authority in the food advertising area which was removed by the U.S. Congress in the early 1980's. Senator Harkin also had a proposal included in the Senate's 2006 Commerce, Justice and Science Appropriations bill that

requires an FTC study on the food industry's marketing activities and expenditures. The House bill did not include the provision, and it was not included in the final conference committee report that was passed into law in November.

The IOM also released a 600-page report in December, funded by a provision inserted into a spending bill by Senator Harkin in 2004, that called for a major shift to more marketing of "healthy" foods and beverages during children's programming. The IOM stated that if voluntary efforts are not successful in making this shift in marketing practices within two years, Congress should pass legislation do so. The report neglected to say what kind of balance would be appropriate, nor how to determine which foods are "healthy" and "unhealthy." While relying on old research, it failed to notice the tremendous advances in the food marketplace over the past few years. It also failed to notice that the FTC found in July that advertising directed towards children on TV has decreased by 34% since 1977.

Senator Ted Kennedy (D-MA) also introduced legislation to regulate advertising in the name of fighting obesity. His bill, S. 799 (the Prevention of Childhood Obesity Act), would require the IOM, a part of the National Academy of Sciences, to make recommendations on national guidelines for advertising that reduce the exposure of young people to ads for foods of "poor or minimal nutritional value." A national summit would then be convened to devise and implement the guidelines. Senator Kennedy's bill would allow the FTC to impose fines for violations.

In addition, Senate Majority Leader Bill Frist (R-TN) once again introduced the Improved Nutrition and Physical Activity (IMPACT) Act, which would provide grants to communities to establish nutrition and physical education programs. ANA supports this legislation.

The FTC held a two-day workshop in conjunction with HHS on food advertising and self-regulation. The conference was held in July. ANA presented at the conference. Dan Jaffe, ANA's Executive Vice President for Government Relations, testified at the workshop. As we did in our IOM testimony, we described how the food industry is responding in the marketplace to the problems posed by obesity in society, through the introduction of 4,500 new low fat or low calorie products. A media literacy campaign under the purview of the Ad Council was also announced at the workshop. Our comments can be viewed at <http://www.ftc.gov/os/comments/FoodMarketingtoKids/516960-00009.pdf>.

At a Kaiser Family Foundation event launching the release of a new study on children's media use in March, Senator Hillary Clinton (D-NY) also blamed advertising for the rise in childhood obesity and called on food marketers to voluntarily agree to stop marketing "junk foods" to kids. Her comments were made in remarks about violence and sexual content in media and entertainment venues. Senator Clinton, along with Senators Joe Lieberman (D-CT), Sam Brownback (R-KS), and Rick Santorum (R-PA), have sponsored legislation (S. 579, the Children and Media Research Advancement Act, or CAMRA), which calls for \$90 million in research funds to examine the effects of electronic media on children's cognitive, physical and behavioral development. One of the initial pilot studies the legislation mandates is a study into the role of media exposure on the development of obesity, including the effect of media advertising. Companion legislation

has been introduced in the House of Representatives (H.R. 4124) by Congressman Ed Markey (D-MA/7).

In July, the Center for Science in the Public Interest (CSPI) called for warning labels on non-diet soft drinks in response to the obesity problem. While they did not call for warnings on advertisements, their spokesperson made reference to the “hundreds of millions” spent each year by soft drink marketers on “slick, seductive” marketing techniques.

At the state level, New York state Assemblyman Felix Ortiz introduced legislation to prohibit companies from claiming a tax deduction in New York on advertising for food, video games and equipment and movies and DVDs when the advertising is shown on television shows primarily watched by children under 18. It also called for raising the state sales tax by % on foods and drinks and the sale and rental of video computer games and movies, as well as imposing a new 1% sales tax on “sweets and snacks” and movie theater admissions.

ANA’s Position

America’s obesity problem is a result of a combination of factors. It cannot be solved through simplistic proposals such as bans or restrictions on food marketing. There is substantial data that strongly suggests that advertising is not a key factor in the growth of obesity in the U.S. ANA, along with the Grocery Manufacturers of America (GMA), conducted an analysis of Nielsen data on advertising from 1993 to 2004, which shows that the number of food, restaurant and beverage advertisements seen by children on TV has declined significantly over the past decade. The data also showed that there has not been a substantial shift of this funding to the Internet. Additionally, obesity rates in various areas of the country are not uniform, as would be expected if advertising, which is fairly consistent nationwide, was a major factor behind obesity. In fact, these rates vary widely even in relatively contiguous areas. As the Surgeon General said in his 2001 report, “there is no simple or quick answer to this multifaceted challenge.”

ANA has supported legislation like Senator Frist’s IMPACT bill that would help communities combat the obesity problem. This approach would help educate the public about the benefits of good nutrition and physical activity, while affirming personal responsibility. We believe the self-regulatory programs of the advertising industry, through the Children’s Advertising Review Unit (CARU) and the National Advertising Division (NAD) programs in the Council of Better Business Bureaus, are active cops on the beat, and we will do what we can to enhance public awareness of these efforts. The FTC, which itself has significant regulatory authority in the advertising area, considers the advertising industry’s self-regulatory program to be a model for other industries. The Ad Council, on which ANA is a board member, also is playing a major role with public service campaigns against obesity, with its “Small Steps” PSA campaign. We will also continue to support efforts by industry to promote new, healthful products to the public.

Next Steps

The food industry will continue to be in the legislative crosshairs for the foreseeable future. But while there is nothing inherently unhealthy about an occasional

cheeseburger or candy bar, Congress may feel increasing pressure to “do something” in the obesity area. International pressures also may increase as obesity issues are also a major focus of the World Health Organization. Unfortunately, this may lead to efforts to ban or restrict the ability of food marketers to reach consumers. The IOM’s proposal may provide encouragement for these efforts. We believe that marketers should be able to advertise those and all other food products in a truthful, non-deceptive way to children, so long as their ads meet the CARU guidelines. ANA is committed to working to find solutions to the obesity problem that do not impinge on the First Amendment rights of advertisers.

Direct-to-Consumer Prescription Drug Advertising

Background

Direct-to-consumer prescription drug advertising is relatively new as a major advertising category. The Food and Drug Administration (FDA) only revised its restrictions relating to DTC advertising in 1997. Since that time, it has rapidly grown to become one of the major advertising categories in the United States, with \$4.45 billion spent on DTC advertising in 2004. At the same time, drug prices also have risen, leading some policy makers to link the rise in price to increased advertising of these products. These developments have led to challenges to DTC advertising at both the federal and state level, either through proposals for outright bans, restrictions or attempts to deny a tax deduction for DTC advertising.

Status

Congressional Activity

DTC advertising attracted major attention in 2005. A number of high-profile drugs, including Vioxx and Bextra, were forced to be pulled from the market due to potential health risks. Critics claimed the driving force behind sales of these drugs was the advertising. These charges provided ammunition to those in Congress who seek to ban or restrict DTC advertising.

In April the advertising industry's own trade publication, *Advertising Age*, endorsed in an editorial a one- or two-year moratorium on the advertising of newly approved prescription drug products, to allow for safety and side effect issues to be sorted out. The editorial argued that suspending ads would shift power back to physicians, providing them time to evaluate new treatments. To support its view, *Ad Age* cited two decisions by drug manufacturers to impose limited ad moratoriums for two newly approved drugs: Palladone, an analgesic; and Symlin, a diabetes drug.

Right before the July 4th Congressional recess, Senate Majority Leader Bill Frist (R-TN) became the highest-profile politician calling for a drug ad moratorium, as well as for FDA preclearance of all advertising. Senator Frist, a well-regarded heart surgeon, noted the educational benefits of DTC advertising before claiming it also has detrimental effects on the doctor-patient relationship. The Senate Majority Leader made clear his belief that DTC ads create an artificial demand, driving up the cost of drugs. He noted, as did *Ad Age*, that a moratorium would allow the potential risks of a drug to fully surface before it is advertised to the public. Senator Frist's floor statement has not yet led to legislation. In the House of Representatives, however, Congressman Sherrod Brown (D-OH/13) has introduced legislation (H.R.3696) placing a two-year moratorium on advertising for newly approved drugs.

Additionally, the Senate Special Committee on Aging held a hearing in late September where members of both parties roundly criticized DTC advertising. Senator Herb Kohl (D-WI), the Ranking Member of the Committee, utilized the hearing to announce his plan to introduce legislation to restrict DTC ads. Senators Ron Wyden (D-OR) and Jim Talent (R-MO) also made negative remarks regarding DTC advertising. Senator Wyden

questioned the value of information conveyed by DTC advertising, and Senator Talent questioned whether DTC advertising was even entitled to First Amendment protection.

There were other legislative developments in Congress. Every session there are bills introduced to ban or restrict the tax deductibility of DTC advertising, and this session was no exception. For instance, Congressman Jerrold Nadler (D-NY/8) introduced a bill (H.R. 575) to completely deny the tax deduction. Also, Congressman Michael Michaud (D-ME/2) introduced legislation requiring the Secretary of Health and Human Services to negotiate with drug manufacturers to reduce the price of drugs for low-income patients. If drug companies refused to enter an agreement with the Secretary, they would lose the ability to deduct their advertising expenses.

Non-tax legislation included a bill by Senator Charles Grassley (R-IA) creating a Center for Postmarket Drug Evaluation and Research at the FDA to evaluate drugs and require substantial additional warnings in advertisements for drugs deemed an “unreasonable risk.” It also included legislation by Senator Wyden requiring the Secretaries of Health and Human Services and Veterans Affairs to report on the percentage of costs for prescription drugs that are directly advertised to consumers and passed on to federal agencies. Senator Wyden’s bill, the Pharmaceutical Advertising and Prudent Purchasing Act (S.1129) would then require Medicare, Medicaid and other government programs to deduct the cost of pharmaceutical advertising from any purchases of prescription drugs. Senator Wyden introduced this provision in October as an amendment to a reconciliation bill in the Senate Finance Committee, but after strong opposition from ANA and others in the advertising and pharmaceutical industries, it was defeated on a vote of 14-6.

One of the most controversial types of DTC advertising are ads for drugs that treat erectile dysfunction (ED). A number of Senators and Congressmen have noted that when discussing the prescription drug issue in general with constituents, these ads are often criticized. Recently departed FDA Commissioner Crawford also was critical of ED advertising. He was quoted as saying that some ads he saw during the NCAA tournament in March were a “bit out of hand” and were “stretching the boundaries considerably.” Congressman Jim Moran (D-VA/8) has introduced legislation in this area. Congressman Moran’s bill, the Families for ED Advertising Decency Act (H.R. 1420) would prohibit ads for erectile dysfunction from airing on radio and broadcast television between the hours of 6am and 10pm. At a Senate Commerce Committee forum on decency in November, Senator Daniel Inouye (D-HI), the Committee’s Ranking Democrat, read a letter from Senator Barack Obama (D-IL) that criticized ED advertising.

State Activity

There also has been legislative activity at the state level as well:

- Washington State: The Washington House of Representatives considered legislation that would have created an exception to the “learned intermediary doctrine” for drugs that are advertised directly to consumers. Under the learned intermediary doctrine, a drug company meets its duty of care if it warns a doctor of the risks of a particular drug. The bill would hold drug companies liable despite such advice if the product is advertised. A hearing was held on the legislation in February, but the legislature adjourned before taking up the bill.

- Maine: The Maine legislature passed legislation imposing new disclosure requirements on DTC advertising that reaches the state. The legislation requires drug companies to post clinical trial information about an advertised drug on a publicly accessible website. The original legislation would have imposed a tax on DTC advertising in the state, but this provision was dropped before passage. Governor John Baldacci (D) signed the bill into law in June.

FDA Activity

The Food and Drug Administration held a two-day workshop on DTC advertising in October. In advance of the workshop, Commercial Alert, a Portland, Oregon based Naderite group, along with a number of medical professors, petitioned the FDA to end all DTC advertising. Panelists at the workshop included Jim Davidson, who represented The Advertising Coalition, of which ANA is a member.

ANA's Position

ANA always has believed that DTC advertising serves a very important consumer education function in our health care system. DTC advertising raises awareness of medical conditions that may be underdiagnosed or not diagnosed at all in millions of patients. It encourages patients to visit their doctors and discuss possibly sensitive medical conditions. Our position has been supported by physician and patient surveys conducted by the FDA, the National Medical Association (NMA) and the National Consumers League (NCL), all of whom have provided strong support for DTC advertising. Any attempt to restrict DTC advertising because of its content, either through taxes or restrictions, would not only be detrimental to public health, but would also raise serious First Amendment concerns.

We support the actions of the Pharmaceutical Research and Manufacturers Association of America (PhRMA) for recently establishing detailed self-regulatory principles for DTC advertising. PhRMA's principles call on drug companies to submit ads to the FDA before broadcast. They also call on drug companies to target their ads to appropriate audiences, and to include an appropriate balance between benefit and risk information. PhRMA plans to set up an office of accountability that will receive comments from both health care professionals and the public. The principles are set to take effect on January 1, 2006. They can be viewed at <http://www.phrma.org/publications/policy//admin/2005-08-02.1194.pdf>

Next Steps

The comments from *Ad Age* and Senator Frist and the various legislative proposals pending in the Congress demonstrate that this issue is highly likely to continue to be controversial. As always, we will work to educate policy makers and the public on the benefits of DTC advertising. Through our membership in The Advertising Coalition, we plan to continue meeting with Hill staff and legislators. DTC advertising is a valuable resource for consumers. Access to health information is vitally important and should not be restricted.

Media Content and Child Protection

Background

Concerns about indecency and violence on television have been on the political agenda for a number of years. The indecency issue gathered steam after the controversial “wardrobe malfunction” at Super Bowl XXXVIII in 2004. Indecency concerns were later tied to the concerns over violent programming when the issues were examined by the Congress. The Federal Communications Commission (FCC) has been under pressure to step up enforcement in the area of indecency and violence as well. Also, the FCC has increased its focus on child directed ads and the issue of product placement.

Status

The FCC announced it was changing its rules concerning advertising during children’s programming in January. Advertising during children’s programming is limited to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. Promotional materials, public service announcements and educational messages were exempted from the time limits. Under the new rules, the FCC would no longer provide these exceptions for promotional messages in determining whether the time limits were being exceeded.

The FCC also adopted strict requirements concerning the broadcast of commercial website addresses during programming. The FCC has delayed implementation of these rules until January 1, 2006. On February 2, ANA, along with the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF) submitted a detailed filing asking the FCC to reconsider the new rules. Our filing argued that the rules would place a dramatic squeeze on the amount of advertising time during children’s programming, driving up the cost, and unreasonably limiting the interaction between TV and the Internet. The petition can be viewed at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516984500.

In October, ANA petitioned to intervene in a suit asking for judicial review of the FCC’s rule change by the U.S. Court of Appeals for the District of Columbia Circuit. The suit was filed by Viacom and Disney, both ANA members. The D.C. Circuit moved the case to the Cincinnati-based Sixth Circuit Court of Appeals in November, where a suit had been filed by the United Church of Christ claiming the rules did not go far enough. The parties reached a settlement in December, and it is awaiting review by the FCC. The settlement would not include promotional materials for other children’s programming in the time limits, and clarified the rule regarding the display of website addresses. More information can be viewed at http://www.ana.net/news/2005/10_18_05.cfm.

In the Senate, Senators Jay Rockefeller (D-WV) and Kay Bailey Hutchison (R-TX) sponsored legislation (S. 616, the Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005) that would allow the FCC to prohibit television programming the Commission determines is violent, if it finds the ratings systems used by the networks are not “effective.” It also raises the fines the FCC can assess for indecency to \$500,000 per violation up from the present \$32,500 per violation. The bill allows local broadcasters to preempt any programming they find objectionable, and

requires 30-second content warnings, both visual and aural, at the beginning of a program and after every additional 30 minutes of a particular program.

The Senate Commerce Committee jumped head first into the indecency and violence controversy with an open forum in November. Chairman Ted Stevens (R-AK) led the forum, which included representatives from activist groups, trade associations, and industry on both sides of the issue. FCC Chairman Kevin Martin detailed three actions the cable industry could voluntarily take to address indecency concerns: a family tier of channels, applying broadcast decency standards to cable, and offering channels a la carte. He also indicated that the Commission was reconsidering its 2004 report on the economic effects of a la carte cable, which he said was based on “problematic assumptions and biased analysis.”

Also at the forum, Senator Daniel Inouye (D-HI), the Committee’s Ranking Democrat, read a letter from Senator Barack Obama (D-IL) which criticized the drug industry’s ED advertisements. Congressman Jim Moran (D-VA/8) went a step further and introduced legislation that would ban as indecent any prescription drug ad for erectile dysfunction on radio and television between 6:00am and 10:00pm.

In the House of Representatives, the legislation to raise indecency fines introduced by Representative Fred Upton (R-MI/6) passed again. Rep. Upton’s bill would raise the FCC’s fines to \$500,000 per violation, and would allow fines to be assessed on individuals, not just broadcasters. Broadcasters would be subject to a license revocation hearing after three indecency violations. Similar legislation stalled in the Senate last year. Also, the House passed legislation (H.R. 3132) to amend the federal reporting requirements for visual depictions of sexual activity involving minors. As drafted, the legislation covered legitimate conduct not related to child exploitation, and expanded the class of people who need to keep records to include those not involved in the initial production. ANA joined an industry letter to the House Judiciary Committee opposing the changes out of the fear legitimate advertisers would fall under the legislation’s broad definitions. The industry letter can be viewed at <http://www.ana.net/news/2005/pdf/pencecoalition.pdf>.

In a slightly different area, Senator Joe Lieberman (D-CT), along with Senators Hillary Clinton (D-NY), Rick Santorum (R-PA) and Sam Brownback (R-KS), reintroduced their legislation calling for research on the impact of media on childhood development. At a speech at the Kaiser Family Foundation in March, Senator Clinton argued that excessive violence and sexual content in media was creating a “silent epidemic” threatening the health and emotional well-being of America’s children. She called for a uniform rating system for all media so that parents could protect their children from inappropriate content.

A report issued in September by the Center for Creative Voices in Media claimed to be able to demonstrate a correlation since 2000 between the rise in the rates of ownership concentration and indecency on the airwaves. The report found that 96% of the indecency violations were levied against the four largest radio groups, which reach 48% of the national audience. This report may become part of the debate in the event the FCC is forced to reconsider its media ownership rules by the courts.

ANA's Position

Parents, not the government, must act as the first line of defense for their children. It is up to them to determine what programming content to allow into their homes. Fortunately, there are already a number of private sector mechanisms available to help parents carry out this responsibility. ANA is a strong supporter of parental controls such as the v-chip and the ratings systems of the television and video game industries. We have also spearheaded the Family Friendly Programming Forum (<http://www.ana.net/family/default.htm>), a coalition of large advertisers who aid in the development and promotion of family entertainment on the airwaves. We do not support government restrictions on protected speech, as these would most likely be unconstitutional. In the past, we have opposed legislation similar to the Rockefeller/Hutchison bill, as it would effectively put the FCC in the role of national censor.

Next Steps

While the number of complaints to the FCC regarding indecent television and radio broadcasts have declined sharply in 2005, pressure will remain on the entertainment industry from Congress for the foreseeable future. Also, a number of the leading critics of violent and indecent entertainment in Congress, such as Senators Clinton, Brownback and Santorum, are rumored to be considering Presidential runs in 2008, so indecency and violence once again may become major campaign issues.

The Digital Transition

Status

In December, Congress reached an agreement regarding the transition to digital television. The switch from analog to digital TV was set to take place on February 17, 2009.

This will have an important impact on the future of the advertising industry. Once TV stations switch to digital, they will return the unused analog spectrum to the government, which will auction it off to companies that will develop new technologies and services, such as ubiquitous wireless broadband or mobile TV.

This transition to new, integrated media will raise a number of new complex issues such as advertising measurement, government regulation, and talent compensation.

First, it will continue to lead to the fragmenting of the audience, which means advertisers will have to come up with new ways to reach the right audience for their products.

Second, the digital conversion will lead to media convergence. As broadcast cable and the Internet begin to meld, the siloed regulatory regimes become less meaningful and rational. In particular, the ability to multicast through digital compression should lead to proliferation of multi-station options on broadcast. This growth of options should seriously undermine the spectrum scarcity arguments that have led to lesser First Amendment protection for broadcast programming and advertising, which underpin the Supreme Court's 1969 *Red Lion Broadcasting v. FCC* decision.

The House of Representatives still must approve the final larger budget reconciliation bill that included the DTV provision, as the Senate made some unrelated changes. We will keep watching this area as it develops, and will advise our members on the legal challenges that may result from the transition.

Privacy and Information Security

Background

Consumer concerns about privacy, both online and offline, have increased. ANA has been active on privacy issues for a number of years. Some privacy standards that have been recommended in the past, such as an opt-in system or a broad definition of what information constitutes personally identifiable information, would have a major impact on marketers. As the marketplace becomes increasingly fragmented, marketers are relying more on detailed consumer information to effectively reach those consumers who would most likely be receptive to their messages. Without this type of information, consumers will receive messages they do not want, and marketers will be forced to waste time and money. We already have seen evidence of a “pushback” against unwanted messages in the “do-not-call,” “do-not-email,” and “do-not-fax” battles.

Status

A number of high-profile security breaches occurred in late 2004 and throughout 2005 that increased attention on data brokers and how they hold and store consumer information. These security breaches led to a proliferation of bills dealing with data security in Congress. There were a number of bills introduced in the Senate and various companion bills introduced in the House of Representatives. Here is a summary of the bills on data security introduced in the 109th Congress:

- Senate Judiciary Committee Chairman Arlen Specter (R-PA) and Ranking Member Patrick Leahy (D-VT) introduced the Personal Data Privacy and Security Act of 2005 (S. 1332), so far the broadest bill relating to data security. Their bill contains a very expansive definition of “sensitive personally identifiable information” that encompasses even a person’s name and email address. Any loss of consumer data would trigger broad notification requirements and possible criminal sanctions for those responsible. ANA joined an industry letter discussing our concerns with Chairman Specter’s legislation.
- Senator Gordon Smith (R-OR) introduced the Identity Theft Protection Act (S. 1408), which would require companies to prevent unauthorized access of consumer data. It calls for companies to give notice of security breaches to consumers and requires that credit reporting companies let consumers place a freeze on access to their credit reports. The Senate Commerce Committee approved the bill in July, sending it on to the full Senate.
- Senate Banking, Housing and Urban Affairs Committee Chairman Richard Shelby (R-AL) introduced the Consumer Identity Protection and Security Act (S. 1461), which would also allow consumers to place a freeze on the release of their credit data to third parties.
- Senator Charles Schumer (D-NY) introduced the Comprehensive Identity Theft Prevention Act (S. 768), which would create an Office of Identity Theft in the Federal Trade Commission (FTC) that would regulate how consumer information is collected, maintained and sold.
- Senator Bill Nelson (D-FL) introduced the Information Protection and Security Act (S. 500), which would require the FTC to regulate information brokers and how they protect consumer information. A companion bill in the House was introduced by

Representative Ed Markey (D-MA/7), the ranking member of the Energy and Commerce Committee's Telecommunications and the Internet Subcommittee.

- Representative Melissa Bean (D-IL/8) introduced H.R. 3140, the Consumer Data Security and Notification Act of 2005, which would require consumer data reporting agencies to adequately protect consumer information and provide notice to consumers in the event of a breach.
- Representative Deborah Pryce (R-OH/15), the third ranking Republican in the House, introduced the Financial Data Security Act of 2005 (H.R. 3375), which would amend the Fair Credit Reporting Act to include protections against identity theft by requiring consumer data services to conduct an investigation in the event of a data breach, and requires notice of the breach be sent to the consumer.
- Representative Stephen LaTourette (R-OH/14) introduced the Consumer Notification and Financial Data Protection Act (H.R. 3374), which would require notice of security breaches, and requires the FTC to devise regulations regarding the disposal of personal information.

Legislation relating to more general privacy issues was introduced in the House of Representatives by Commerce, Trade and Consumer Protection Subcommittee Chairman Cliff Stearns (R-FL/6). Congressman Stearns' bill, the Consumer Privacy Protection Act of 2005 (H.R. 1263) would regulate both offline and online privacy, requiring companies to provide clear and concise notice to consumers when they first attempt to collect personally identifiable information. It sets up an opt-out regime that would allow consumers to preclude the sale and disclosure of personally identifiable information to third party organizations. Companies also will have to prepare and implement information security policies to prevent the unauthorized disclosure or release of personally identifiable information. Congressman Stearns' bill does not allow for a private right of action for individuals. Congressman Stearns also introduced a bill dealing with data security, the Data Accountability and Trust Act (H.R. 4127).

Senator Dianne Feinstein (D-CA) also reintroduced privacy legislation. Her bill, the Privacy Act of 2005 (S. 116) would regulate the collection and use of personally identifiable information. Marketers would be required to provide consumers with notice and the ability to opt-out of the sharing of non-sensitive information. It also would require opt-in consent from the consumer for health and financial data. The bill establishes a safe harbor for entities that follow self-regulatory guidelines issued by "seal programs," and approved by the FTC. It also preempts state laws relating to the collection, disclosure and sale of personally identifiable information.

Spyware

Spyware continued to receive attention in Congress as well. Representative Mary Bono (R-CA/45) introduced the Securely Protect Yourself Against Cyber Trespass Act, (or SPY Act, H.R. 29), which would make it unlawful to alter a user's computer settings, such as changing the user's Internet browser home page, other Internet connection settings, or Internet bookmarks. It would also make it illegal to induce a user to install software by deceptive means. Additionally, users must receive "opt-in" notice when an information collection program is about to be installed on their computer and must give consent to the installation. Representative Bob Goodlatte (R-VA/6) introduced legislation, the Internet Spyware Prevention Act of 2005 (or I-SPY Act, H.R. 744) to target the "bad

actors” that use spyware to obtain and use personally identifiable information. The House passed both bills in May. Senator Conrad Burns (R-MT) introduced spyware legislation in the upper chamber. His bill, the SPYBLOCK Act, would prohibit installation of computer software by a third party unless the user is provided notice, gives consent, and is provided a way to remove the software.

The Children’s Online Privacy Protection Act (COPPA)

The Federal Trade Commission also was active in the children’s privacy area in 2005. In January, it proposed making permanent the “sliding scale” approach for obtaining parental consent to collect personally identifiable information from children under the Children’s Online Privacy Protection Act (COPPA). ANA, the Direct Marketing Association (DMA), and others in the advertising community had been urging this step. The sliding scale requires that companies that collect information for its internal use obtain parental consent through e-mail, plus some additional step to provide assurance the person providing consent is actually the parent. If a company wishes to disclose a child’s personally identifiable information to a third party, a more reliable method of obtaining consent is required, such as a credit card transaction or PIN number. The FTC adopted the sliding scale in 1999, with the intent to phase it out once more sophisticated technology was developed. This technology has not emerged, so the FTC plans on making the sliding scale permanent. The FTC also sought comment on the use of credit cards to obtain consent, since many children now have debit cards, and whether this affects the ability of websites to ensure the person giving consent is the parent. Comments on both issues were due on June 27th, and the FTC announced it would consider proposed rulemakings based on the comments it received.

ANA’s Position

ANA believes the free flow of and access to consumer information provides substantial benefits to the economy. We recognize, however, a need to ensure the safety and security of personal information. ANA has supported various efforts, both private and public, to protect consumer privacy. We were an early supporter of private sector initiatives, including self-regulatory best practices programs and seal programs. The FTC is also very active in enforcing the privacy laws already on the books. These initiatives strike the best balance between consumer concerns and the viability of consumer marketing. We oppose broad privacy legislation that would impose an “opt-in” regime, as this would severely limit the information available to marketers, would hurt economic efficiency, and thereby adversely affect consumers.

Next Steps

After a hiatus, privacy issues appear to be back near the top of the Congressional agenda. Senate Commerce Chairman Ted Stevens (R-AK) has said he will send a data security bill to the floor by January. In the House, Energy and Commerce Chairman Joe Barton (R-TX/6) has indicated that broad privacy legislation is likely out of his committee early next year. We will try to inform policymakers about the benefits of the free flow of consumer information, so that the legislation does not overly restrict the types of data available to marketers. Legislation attempting to regulate spyware is also likely to move, which could expand into a wider debate over privacy.

Unsolicited Commercial Email (Spam)

Background

Unsolicited commercial email continues to frustrate consumers and erode the effectiveness of email marketing. Congress passed the CAN-SPAM Act in 2003 to provide government and the public with the ability to stop unwanted email. The Act clearly establishes a distinction between legitimate commercial email and spam. The law requires companies to give consumers a clear and conspicuous “opt-out” of future emails. The Federal Trade Commission (FTC) received enhanced tools to target fraudulent and deceptive emails. ANA worked to secure the passage of the CAN-SPAM Act. At the same time, we issued, in conjunction with the Direct Marketing Association (DMA) and the American Association of Advertising Agencies (AAAA), a set of self-regulatory guidelines for email marketing best practices. These guidelines provide our members that employ email marketing guidance on how to effectively use email as a communications tool with consumers. Our General Counsel, Doug Wood, advised our members with guidance on complying with the CAN-SPAM Act.

Status

The FTC has continued to use the authority it received under the CAN-SPAM Act to target senders of fraudulent emails. It, along with the Department of Justice and state attorneys general has brought over 50 cases against individuals and organizations sending out deceptive emails to consumers since the law’s enactment. It also has continued to implement various parts of the Act, issuing rulemakings in 2005 relating to the “primary purpose” of email messages and defining certain key terms and provisions.

In August, the FTC tested 100 top Internet retailers’ compliance with customer “opt-out” requests, and found high compliance with the provisions of the CAN-SPAM Act. The Commission found that 89% honored a request to be removed from their mailing list.

Part of the FTC’s responsibility under the act was to report to Congress regarding its enforcement of the act, and whether any marketplace developments have affected the effectiveness of the law’s provisions. Its report, issued in December, found that the CAN-SPAM Act had provided law enforcement with additional tools to fight spam, and that many marketers had responded to the law by instituting best practices, just as we recommended to our members. The report also noted that continued education efforts were needed to inform consumers about how they can protect themselves from sexually explicit spam.

Members of Congress, such as Senator Charles Schumer (D-NY) continue to push for a “do-not-email” list, despite FTC opposition. The FTC believes that the so-called “bad actors” in this area would not comply with a registry and would attempt to “hack” the list thereby increasing the concerns about spam.

On the state level, both Michigan and Utah tried ways to get around the CAN-SPAM law by initiating email “registry” programs. The registries allow parents or guardians to register so-called “contact points” to which children 18 and under have access, such as

email or instant messaging, and prohibit sending certain types of advertisements to them. Companies are required to scrub their lists monthly for specified fees against the registry. Both laws set stiff penalties for failing to comply, with fines and criminal penalties. Illinois has email registry legislation pending. Based on a request by an Illinois legislator, the FTC wrote a letter stating its concerns about a children's email registry.

While both states have begun to develop lists of covered product categories including tobacco, alcohol and pornographic material, they have made clear that this list is not all-inclusive. There are numerous additional products that children are prohibited from purchasing. Also in Utah, the registry would apply to products that have been found to be "harmful" to children. These laws are extremely broad, ultimately allowing the state to prohibit expanding categories of speech to be effectively communicated by way of the Internet and other new media.

The Michigan legislature considered technical amendments to the registry in October. ANA used the opportunity to state our opposition to the registry in a letter to the Chairman of the House Energy and Technology Committee. Our letter argued that the registry raises serious security concerns, as it may be an enticing target for hackers and spammers. Children especially need to be protected from those that may take advantage of them. Also, we noted that the registry raises serious First Amendment and interstate commerce issues. Our letter can be read at <http://206.112.94.245/news/2005/commentonmichigan.pdf>.

In Utah, we have petitioned the federal District Court for leave to file a friend-of-the-court brief in a lawsuit challenging the registry.

ANA's Position

The FTC, in its December report, noted that the volume of spam had leveled off, and the amount reaching consumers had decreased, thanks to the tools provided by the CAN-SPAM act and through technological advances. In supporting the CAN-SPAM Act, ANA always believed that the cooperation of government, business and technology would be necessary to act against fraudulent and misleading spam.

Next Steps

We are concerned about the burdens laws such as those passed in Michigan and Utah will create. These laws try to get around the CAN-SPAM Act, but the lack of adequate definitions or limitations on the categories of speech involved provide government far too broad discretion in deciding what speech consumers will be allowed to receive. We are concerned that other states will follow the lead of Utah and Michigan if these registries are upheld. On the federal level, the threat of a "do-not-email" registry continues. The FTC, however, has demonstrated that progress is being made in this area. It will take time to see the full effects of the CAN-SPAM Act. We will continue to support the FTC's enforcement actions against fraudulent and misleading spam. We will also continue to encourage businesses to follow email "best practices."

Unsolicited Commercial Faxes

Background

Under the Telephone Consumer Protection Act of 1991 (TCPA), the Federal Communications Commission (FCC) obtained authority over commercial faxes. The FCC's rules implementing the Act included an exception that allowed the transmission of unsolicited faxes to recipients with whom the sender had established a previous business relationship. In 2002, the FCC reevaluated these rules and determined that the TCPA did not permit this exemption. The following year, the FCC issued new rules regarding unsolicited commercial faxes. These rules required express written permission from the recipient before an unsolicited commercial fax was sent. Many ANA members opposed these new rules, which would have made fax communications prohibitively expensive. We urged the FCC to reconsider the rule changes in a Petition for Reconsideration, and also asked Congress to step in to block the revised rules.

Status

After a number of delays, the FCC's rules were scheduled to take effect on July 1, 2005. ANA urged the Congress to take action to restore the old rules before the deadline. In mid June, however, the FCC again delayed implementation of the rules for six months. This delay allowed Congress time to pass legislation that reinstated the FCC's prior rules. The Senate passed S. 714, the Junk Fax Prevention Act of 2005 (sponsored by Senator Gordon Smith (R-OR) in early June. The House took up the bill and passed it at the end of June. The President signed the bill into law in July.

In October, however, California Governor Arnold Schwarzenegger (R) signed into law a bill imposing significant burdens on the transmission of interstate and intrastate unsolicited faxes. The new law requires express prior consent of the recipient, and has no exception for an established business relationship. It also mandates specific information regarding identifying the sender be sent with every fax. The law takes effect on January 1, 2006, but ANA, as part of the Fax Ban Coalition, has asked the FCC to declare that the interstate provisions of the California legislation are pre-empted by the new federal law.

Next Steps

We were quite pleased with Congress' action in this area. ANA was happy to work with our members in opposing the restrictions and supporting the legislation. Without it, companies that rely on fax marketing faced onerous restrictions. Following the restrictive rules proposed by the FCC would have been extremely expensive and a logistical nightmare, especially for smaller businesses. Now with the law in place, marketers can continue to send faxes to customers with which they have an established relationship. It is our view that the California bill is pre-empted by federal law and is an unconstitutional state restriction on interstate commerce. We believe that the FCC will reach the same conclusion.

Nielsen Ratings

Background

Nielsen Media Research is the only ratings system that provides audience measurement data to the broadcast and cable networks and advertisers. It has come under fire for its introduction of local people meters, or LPMs. These are a local version of the people meters that have been used nationally by Nielsen since 1987. Nielsen claims these new meters are more accurate than the diary system that has been in place since the 1950's. Under that system, viewers log the shows they watch into a diary, which Nielsen then uses to calculate program ratings. In some of the markets where LPMs have been introduced, however, critics, including some major broadcasters, have alleged that minorities are being undercounted by the new system. On the other hand, a number of groups including some minority-oriented cable networks and the Reverend Jesse Jackson, have endorsed the use of LPMs, saying that they are helping to create a broader sample of viewers across all networks, which includes previously undercounted minority groups.

Status

As a result of the controversy, legislation was introduced in Congress requiring that television ratings systems be accredited by the government. In the Senate, Senator Conrad Burns (R-MT) introduced a bill (S. 1372, the FAIR Ratings Act) that would require the accreditation by the Media Ratings Council (MRC) of any new ratings system before it could be implemented. The MRC would ensure that the ratings system is accurate and representative of audience demographics. A hearing was held on this bill on July 27, 2005.

In the House, Representative Vito Fossella (R-NY/13) put in a bill (H.R. 3298, the Television Viewer Consumer Protection Act of 2005) that would prohibit the sale of ratings data by a service not accredited by the MRC.

ANA's Position

ANA is opposed to the legislation currently pending in Congress. The advertising industry long has supported self-regulatory initiatives over government intervention, and the MRC's voluntary accreditation process has worked for many years. We see no need to modify this self-regulatory approach at this time. Also, the proposed bills have the potential to slow the introduction of new technologies and new entrants into the field. A more detailed description of our position is available at http://ana.blogs.com/jaffe/2005/07/fair_ratings_ac.html.

Next Steps

A hearing was held on Senator Burns' bill in late July. It remains to be seen if the bill will advance in the upcoming Congress. We will continue to inform members of the Senate and House of Representatives of our opposition to government imposition of restrictions in the television ratings area.

Product Placement

Background

Product placement is the practice by which companies place their brand-named products in television programs. The products are often then used by the characters in the production, giving the setting a real-world air. Many programs on television showcase this type of marketing. The use of product placement is regulated by the Federal Communications Commission (FCC) and Federal Trade Commission (FTC). The FCC requires that the sponsor be identified once during the broadcast of the program, and the FTC prohibits any false or misleading placements.

Status

In 2003, ANA opposed a petition filed with the FTC and FCC by Commercial Alert, an activist group with ties to Ralph Nader. The petition asked the FTC and FCC to conduct an investigation and rulemaking that would devise new disclosures. Commercial Alert recommended rules that called for product placements to be identified on screen as they appear, as well as before and after the program. It argued that airing a disclosure after the program was not sufficient, as many people will have changed the channel or turned off the television by that point. We argued that these recommended disclosures would be impractical and would make television virtually unwatchable. We noted that the proposals were an attempt to unconstitutionally restrict protected speech.

In February, the FTC responded to Commercial Alert, rejecting their call for an investigation. The Commission felt that the current rules, evaluating placements on a case-by-case basis, were sufficient to protect consumers, including children.

The FCC has yet to respond to Commercial Alert's petition. However, in May, FCC Commissioner Jonathan Adelstein attacked product placement, saying that it "turns news and entertainment shows alike into undisclosed commercials." He also urged consumers to record examples of product placement and file complaints with the FCC if there was not adequate disclosure.

The Writers Guild of America (WGA), in the midst of a dispute with a number of producers of reality programming and the networks that air reality shows, has criticized the "crass commercialization" of reality television that is "turning [the programs] into virtual 'infomercials' that are more about selling products than entertaining TV viewers." It has set up an Internet and media campaign parodying reality programming and the brands shown in product placements in the shows.

Next Steps

We were heartened by the FTC's stance on the product placement issue. It was good news for advertisers. The FTC already has sufficient authority to go after false or misleading advertising in the product placement area. We are still waiting to hear what position the FCC will take on this issue and whether they, like the FTC, will respond positively to our petition.

Alcohol Beverage Advertising

Background

Alcohol beverage advertising continues to be under attack. Critics allege that it “glamorizes” consumption of alcohol beverages, making it appealing to those who are underage. Groups such as Mothers Against Drunk Driving (MADD), the Center for Science in the Public Interest (CSPI) and the American Medical Association (AMA) have pushed for limits or bans on alcohol advertising. These groups are increasing the pressure on Congress to impose restrictions in the alcohol beverage advertising arena.

Status

On the legislative front, Representative Tom Osborne (R-NE/3) reintroduced his resolution calling for the National Collegiate Athletic Association (NCAA) to end all alcohol advertising during radio and television broadcasts of its sporting events (H.Res 145). When Rep. Osborne introduced a similar resolution in Congress in 2004, ANA wrote to the members of the Education and the Workforce Committee opposing it. We argued that the audience for NCAA broadcasts was overwhelmingly adult, and that the industry takes great care to insure its ads are seen by appropriate audiences. We noted that the Federal Trade Commission (FTC) had found the industry was making important strides through self-regulation in regard to both ad placement and ad content in the alcohol beverage area. The resolution would have the effect of holding alcohol beverage advertisers to a more rigid standard than any other advertising category. There was talk the resolution would be brought up as an amendment to the higher education reauthorization bill in July, but the proposal was never brought up in the Education and the Workforce Committee.

In August, the NCAA adopted an alcohol policy recommending all member institutions prohibit the sale of alcohol beverages and on-site advertising during athletic events, and that its members promote legal and responsible use of alcohol.

Also in 2005, legislation again was introduced by Senator Michael DeWine (R-OH) and Representative Lucille Roybal-Allard (D-CA/34) calling for research into the “type and quantity of alcoholic beverages consumed by underage drinkers, as well as information on brand preferences of these drinkers and their exposure to alcohol advertising.” The bills, the Sober Truth on Preventing (STOP) Underage Drinking Act (S. 408/H.R. 864) cited a number of studies from the Center on Alcohol Marketing and Youth (CAMY) regarding ad spending and placement.

CAMY followed up on a number of its studies from previous years in 2005. It again claimed that children were being “overexposed” to alcohol beverage ads, and that alcohol beverage ads were “overwhelming” alcohol responsibility ads on television.

A number of class action suits against the alcohol industry were still pending in state courts in 2005. The suits were filed in late 2003 and early 2004 in the District of Columbia, Colorado, North Carolina, Ohio, and California. The suits allege alcohol beverage companies engaged in a “long-running, sophisticated, and deceptive scheme to

market alcoholic beverages to children and other underage consumers." The California suit was dismissed in early 2005.

ANA's Position

The alcohol beverage industry takes great care that its advertising is seen by overwhelmingly adult audiences. The alcohol beverage industry trade groups, including the Beer Institute (www.beerinstitute.org), the Wine Institute (www.wineinstitute.org) and the Distilled Spirits Council (www.discus.org), have all developed stringent codes that determine ad placement and set limits on content. In recent years, industry has strengthened its codes in response to FTC recommendations, and the FTC has commended industry for its improvements. These industry codes go further than what could be legally imposed by legislation. The alcohol beverage industry also supports tougher penalties for illegal sales and fosters a variety of public education campaigns. Truthful, non-deceptive advertisements cannot be restricted without raising serious First Amendment concerns.

Next Steps

There will continue to be pressure on Congress to act in the alcohol beverage advertising area. It also appears that opponents of the alcohol beverage industry are turning their attention to the courts. We will continue to monitor developments in both areas.

Tobacco Advertising

Background

In 2004, as part of a corporate tax bill, the Congress passed a so-called “buyout” program to end the Depression-era quota system for tobacco. At the time, some members of Congress, including Senator Edward Kennedy (D-MA) and Senator Mike DeWine (R-OH), attempted to tie the buyout to Food and Drug Administration (FDA) regulation of tobacco products and tobacco advertising. These regulations were similar to rules promulgated by the FDA in 1996 and thrown out by the United States Supreme Court in 1998 due to the FDA’s lack of regulatory authority over tobacco products. These Senators did not succeed in their effort, and authority to regulate tobacco advertising remains with the Federal Trade Commission (FTC).

Status

Bills to put tobacco advertising under FDA jurisdiction were reintroduced in 2005. Senator DeWine and Representative Tom Davis (R-VA/11) introduced legislation that was similar to their legislation of the past few Congresses. Their bill, the Family Smoking Prevention and Tobacco Control Act (S. 666/H.R. 1376), would require the FDA to publish an interim final rule similar to the FDA’s 1996 rules. It also would go further than those rules, mandating the specific text of warning labels and the text and color of advertisements. It would allow states to impose their own restrictions on advertising as well.

Another bill, Senator Tom Harkin’s (D-IA) Healthy Lifestyles and Prevention America Act (or the HeLP America Act, S. 1074) would not only give FDA jurisdiction over tobacco advertising, but would also disallow the federal tax deduction for tobacco advertising.

Without the tobacco buyout as a vehicle, none of this legislation went further than the committee level.

ANA, along with the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF), submitted a brief to the California Supreme Court in the case *Boeken v. Philip Morris*. In that case, the plaintiff alleged, among other things, that Philip Morris fraudulently portrayed smoking in its advertising as sophisticated and appealing, even though the ads contained no objectively misleading statements or health claims. The California Court of Appeal for the Second District found for the plaintiff, and Philip Morris appealed. We urged the California Supreme Court to overturn the case, as the lower court’s decision would set a dangerous precedent. In our view, it would dramatically expand the class of behavior that gives rise to liability in the absence of health warnings. The California Supreme Court declined to hear the case in August, and Philip Morris filed a petition for a writ of certiorari with the United States Supreme Court on November 8, 2005.

We also filed a “friend of the court” brief in another case in California. That case, *Daniels v. Philip Morris USA, Inc. (In Re Tobacco Cases II)*, was brought against four major tobacco companies under California’s false advertising code, alleging the companies had targeted minors through their advertising. The plaintiffs argued the ads

were illegal because they “glamorized” tobacco products and made it attractive to minors as well as adults, and were not afforded any First Amendment protection since the advertising promoted supposedly “illegal” sales. The lower court dismissed the suit, and the plaintiff appealed to the California Supreme Court. Our brief was authored by noted First Amendment lawyer Floyd Abrams, and it urged the court to reject the lawsuit. It argued that if the court ruled in favor of the plaintiffs, it threatened all types of marketing in California. Companies truthfully promoting adult oriented products would be exposed to civil liability in the name of protecting minors. This case is still pending before the court.

For more information please see the “Key Court Cases” section beginning on page 35.

ANA’s Position

ANA historically has taken no position on the regulatory authority over tobacco products in general. However, we remain opposed to granting the FDA authority over tobacco advertising. We strongly responded to the FDA’s proposed 1996 rules, which we argued were unconstitutional. In this effort, we were joined by such noted First Amendment scholars and litigators across the political spectrum as Judge Robert Bork, Burt Neuborne of New York University Law School, Dean Rodney Smolla of the University of Richmond, Laurence Tribe of Harvard University, and Floyd Abrams. All agreed that the FDA’s proposals would raise serious First Amendment concerns. Also, the regulations would create dangerous precedents for other categories of advertising, as they would be the most extensive imposed on any advertising category. In 2004, we had the Patton Boggs law firm develop a comprehensive analysis of the proposals put forth in the DeWine and Davis bills. The analysis can be read at <http://206.112.94.245/pdf/tobaccocontrolact.pdf>.

Next Steps

We will continue to monitor developments in this area on Capitol Hill and in the courts. The Supreme Court has long upheld the commercial speech rights of advertisers. We hope that this will discourage sweeping restrictions on advertising in this area. We will continue to defend the right of advertisers to promote their products to an age-appropriate audience.

Key Court Cases

ANA follows the important advertising cases every year in both the federal and state court systems. We have participated in the vast majority of U.S. Supreme Court cases involving the commercial speech rights of advertisers, either as a party or through a “friend-of-the-court” brief. Our involvement has helped convince the courts to significantly strengthen the First Amendment protection given to commercial speech over the past thirty years. We also have been increasingly active in cases in the Federal Courts of Appeal and in several state Supreme Courts.

In addition, we regularly provide updates in regard to key cases on our website, at <http://www.ana.net>.

Food Advertising

Hardee v. Del Mission Liquor

This class action suit was filed in March 2005 in San Diego (CA) Superior Court. It alleged that Kraft, General Mills and Kellogg’s falsely represented, through their advertising and packaging, certain cereal brands as “low sugar,” and thus more nutritious. The suit alleges that the advertising for these products deceptively fails to disclose that the carbohydrates lost from the reduction in sugar is replaced by other carbohydrates. The case was filed under California’s Business and Professions Code. You may recall that the California Business and Professions Code was the predicate in the case *Kasky v. Nike*, 45 P.3d 243 (Cal. 2002). In that case, the California Supreme Court ruled against Nike, and the U.S. Supreme Court failed to resolve the matter, returning it to the lower courts for further consideration. A more detailed description of the *Nike* case and its ramifications for advertisers can be seen at http://www.ana.net/news/2004/01_07_04.cfm.

Pelman v. McDonald’s Corporation

On January 25, 2005, the Second Circuit Court of Appeals reinstated this extremely important case dealing with food marketing and advertising. The case was appealed from a motion to dismiss the amended complaint granted by the U.S. District Court for the Southern District of New York. The original complaint was dismissed in January 2003 by Judge Robert Sweet. In the original complaint, the Plaintiffs, two teenage girls, alleged that McDonald’s, through their marketing techniques, such as toy giveaways, were geared towards inducing children to purchase and eat their products. Their complaint also stated that McDonald’s failed to disclose the ingredients or health effects of consuming its products in its advertising or labeling, and they also alleged that McDonald’s acted negligently in marketing products that were physically and psychologically addictive. The Plaintiffs contend that McDonald’s actions led the plaintiffs to become obese and suffer from health problems associated with obesity. Judge Sweet wrote, “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.” The plaintiffs had 30 days to re-file after their complaint was dismissed, which they did in February 2003.

Their new 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 concerning the nutritional value of some of its products, including its Chicken McNuggets and French fries. It also alleged that these products were in fact detrimental "to an extent beyond which was contemplated or understood by the reasonable and ordinary...purchaser and consumer." In his September 2003 decision, Judge Sweet found that the plaintiff's vague assertion of a "long term deceptive campaign" of advertising was not sufficient. He ruled that the complaint stated a conclusion to that effect without making a factual allegation. Instead, the advertising campaign upon which they relied was "not objectively deceptive," Judge Sweet wrote. He also found that the plaintiffs had not sufficiently proved that McDonald's products and actions caused them injury.

The Second Circuit ruled that under the Federal Rules of Civil Procedure and the New York General Business Law, Judge Sweet improperly dismissed the amended complaint. The Second Circuit remanded the case to the District Court and allowed plaintiffs to re-file and seek discovery.

Alcohol Beverage Advertising

Class Action Suits

A number of class action lawsuits have been filed in several courts across the country regarding the alcohol beverage industry's advertising and marketing of malt beverages. Three of the cases allege a "long-running, sophisticated, and deceptive scheme by certain alcohol beverage manufacturers to market alcoholic beverages to children and other underage consumers" and claim the manufacturers have reaped billions of dollars in profits because of the alleged deception. The first case to be filed was *Hakki v. Zima Company et. al.*, filed in the District of Columbia Superior Court on November 14, 2003. This case was followed by *Kreft v. Zima Company et. al.*, filed December 3, 2003 in Denver (CO) Superior Court and by *Wilson v. Zima Company et. al.*, filed in Mecklenburg County (NC) Superior Court January 13, 2004. Finally, a similar suit, *Eisenberg v. Anheuser-Busch Co.* was filed on April 30, 2004 in Cuyahoga County (OH) Superior Court. These four cases were filed by the law firm of David Boies, who represented former Vice President Al Gore in the 2000 election recount in Florida. Another case filed in California has since been dismissed. That case, *Goodwin v. Anheuser-Busch Co., Inc. and Miller Brewing Co.*, filed in Los Angeles Superior Court on February 3, 2004, specifically targeted the marketing practices of two alcohol beverage companies and included advertising for other products, not just malt beverages. The cases cited the many studies of the Center on Alcohol Marketing and Youth at Georgetown University (CAMY) in making its argument that the industry has targeted underage drinkers.

Direct-to-Consumer Prescription Drug Advertising

AFL-CIO v. AstraZeneca Pharmaceuticals, L.P.

A coalition of groups filed suit against AstraZeneca on October 18, 2004 in Los Angeles County (CA) Superior Court, alleging the company violated the California Business and Professions Code in its marketing of Nexium. Nexium is a prescription drug that treats acid reflux disease. Specifically, these groups contend that AstraZeneca's actions were

unfair and deceptive practices that were unjustly enriched through sales encouraged by advertising that “materially misrepresent[ed]” Nexium to consumers.

The coalition includes the AFL-CIO, the Congress of California Seniors (CCS) and the California Alliance for Retired Americans. Their complaint claims that:

- AstraZeneca promoted Nexium as “more powerful,” “more effective,” and a significant improvement over Prilosec, the drug it replaced, which it alleges was false;
- It failed to disclose an unpublished clinical study that showed Nexium was no more effective than Prilosec at an equivalent dose;
- Its conduct in promoting it to doctors and consumers without mentioning this created demand that would not have otherwise existed through inducing doctors to prescribe and consumers to purchase Nexium;
- Its promotional materials for doctors were unfair and deceptive; and
- AstraZeneca was unduly enriched because of the advertising that promoted the product.

The suit also explicitly mentions the criticism of DTC advertising, often heard, that “it encourages patients to demand high-cost prescriptions for ailments that could be treated effectively with lower cost options.” The question remains whether this case is limited in scope or is the first sign of a broader assault on prescription drug advertising based on the California Business and Professions Code. The plaintiff filed an amended complaint in March 2005 and a hearing and status conference is scheduled for February 2006. Meanwhile, a nationwide class action complaint was filed in Delaware federal court in June, 2005, citing misleading promotion and advertising in the marketing of Nexium. The Delaware suit was thrown out of court by a federal judge in November on the grounds that the Food and Drug Administration has already determined the information is not false and misleading, and that a suit under state law would be preempted by federal law.

Tobacco Advertising

Boeken v. Philip Morris, Inc.

In this case, the California Court of Appeal for the Second District found that Philip Morris enticed people to smoke through the representations in its advertising. The advertising contained no objectively misleading statements or health claims; despite this fact, the court ruled for the plaintiff. Philip Morris appealed, and ANA, along with the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF) filed a “friend-of-the-court” brief with the California Supreme Court urging it to review the lower court’s decision. In our amicus brief, we urged that if the lower court’s decision stood, it would greatly expand the class of behavior that would give rise to liability in the absence of health warnings, simply by showing attractive, healthy people in advertisements. Our brief can be read at http://www.ana.net/news/2005/8As_Boeken_amicus.pdf. The California Supreme Court declined to hear this case in August. Philip Morris filed a petition for a writ of certiorari with the United States Supreme Court on November 8, 2005.

Daniels v. Philip Morris USA, Inc. (In Re Tobacco Cases II)

This suit was brought against four major tobacco companies under California's false advertising code, alleging the companies had targeted minors through their advertising. The plaintiffs argued the ads were illegal because they "glamorized" tobacco products and made it attractive to minors as well as adults, and were not afforded any First Amendment protection since the advertising promoted supposedly "illegal" sales. The lower court dismissed the suit, and the plaintiff appealed to the California Supreme Court. ANA, along with the AAAA and AAF, filed a "friend-of-the court" brief with the court. Our brief was authored by noted First Amendment litigator Floyd Abrams of the Cahill, Gordon and Reindel law firm. It urged the court to reject the lawsuit, arguing that it posed a threat to all marketers in California. If the plaintiffs succeeded, companies truthfully promoting adult oriented products would be exposed to civil liability in the name of protecting minors. More information can be viewed at http://206.112.94.245/news/2005/09_14_05.cfm. This case is still pending.

Price and Fruth v. Philip Morris, Inc.

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 Class sued under the Illinois Consumer Fraud Act and the Uniform Deceptive Trade Practices Act, contending that these representations were material and false because the members of the Class did not in fact 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. Philip Morris asked the judge to reduce the damages to \$1.2 billion in order that its appeal could "proceed in an orderly fashion" and without the company being forced into bankruptcy. The judge later reduced the size of the bond and stayed execution of the verdict. The case was appealed to the Illinois Supreme Court, which threw out the suit in December. The court ruled that since the Federal Trade Commission authorized the use of terms such as "light," Philip Morris could not be liable under the Consumer Fraud Act.

Coalitions

ANA remains an active member of The Advertising Coalition; the Alliance for American Advertising (AAA); the Freedom to Advertise Coalition (FAC); the State Advertising Coalition (SAC); the Coalition for Health Care Communication (CHC); and 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.

The Advertising Coalition

The Advertising Coalition was established in 1988 to direct the fight against federal advertising tax proposals. It has since expanded its scope to include general advertising issues. There are currently eight member associations including: the ANA; the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); the Grocery Manufacturers of America (GMA); the Magazine Publishers of America (MPA); the National Association of Broadcasters (NAB); the National Cable & Telecommunications Association (NCTA); the Newspaper Association of America (NAA); and the Pharmaceutical Research and Manufacturers of America (PhRMA). In 2005, The Advertising Coalition worked to educate Members of Congress and their staffs on the benefits of prescription drug advertising.

The Alliance for American Advertising

Leaders in the advertising and media industries have created The Alliance for American Advertising (AAA) to present to policymakers and to the general public a forceful and informed profile of an industry committed to responsible advertising. The Coalition will demonstrate that the nation's advertisers, manufacturers, and advertising and media professionals, are community and national leaders who are prepared to increase their already significant efforts to educate the public on the general causes of obesity and support effective ways to reverse this trend.

The ANA, along with the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); and the Grocery Manufacturers of America (GMA) are charter members of the AAA. Additional association members include the Snack Foods Association; the National Restaurant Association; the Magazine Publishers of America (MPA), along with industry members Kraft, PepsiCo, General Mills, and Kellogg's. The membership is likely to grow in the coming years as both additional industry members and associations have been invited to join.

Freedom to Advertise Coalition

The Freedom to Advertise Coalition (FAC) is an informal coalition whose purpose is to oppose proposals that restrict truthful and non-deceptive advertising for any legal product or service. FAC's members include the ANA and the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); the Magazine Publishers of America (MPA); the Direct Marketing Association (DMA); the Newspaper Association of America (NAA); the Outdoor Advertising Association of America (OAAA); and Point-of-Purchase Advertising International (POPAI). FAC was very involved in privacy issues in 2005.

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 120 ad tax proposals in over 40 states. 2005 was no exception, as we again faced a number of state ad tax proposals (see page 9 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 of 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); the Association of Medical Publications (AMP); the Healthcare Businesswomen's Association (HBA); the Healthcare Marketing and Communications Council (HMC Council); the Medical Marketing Association (MMA); the 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 carries out these programs by advocating these positions to federal and local officials. It also promotes activities by its members that encourage consumers in reaching the correct balance between fitness and nutrition, engages in ventures with public and private entities to promote fitness and nutrition programs, and supports 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. More information about the ACFN can be found at <http://www.acfn.org>.