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2006 Compendium of Legislative, Regulatory, and Legal Issues



Leading the Marketing Community

2006 Compendium of Legislative, Regulatory, and Legal Issues *

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2006 Compendium of Legislative, Regulatory, and Legal Issues

Introduction

2006 was a challenging year for the Washington office of the Association of National Advertisers. We confronted a number of serious legislative, regulatory, and legal challenges to advertising. Our activity centered on a number of key issues, including: the continuation of attacks, both in Congress and in the courts, on food advertising; new proposals to limit advertising and marketing to children; and an increased spotlight on information security and privacy issues. We also faced advertising tax proposals in a number of states; additional calls for a moratorium or restrictions on prescription drug advertising; an ongoing focus on advertising categories such as alcohol beverages and tobacco products; and a number of attempts to limit commercial speech in the name of consumer protection.

With the change in Congressional control and continuing budget deficits, we know our challenges are likely to intensify. Below is a summary of the most serious challenges that we confronted in the past year, and how the Washington office responded:

1. Federal Advertising Tax Proposals: Senator David Vitter (R-LA) proposed an amendment to the Senate budget resolution that would allow pharmaceutical companies to take a deduction for advertising expenses that equaled only half of their research and development budget for the previous year. The amendment was not adopted. Other proposals to limit or ban the ad tax deduction, such as Congressman Jerrold Nadler's (D-NY) proposal to entirely eliminate it, were considered in the prescription drug area. ANA has worked to educate policymakers of the benefits of prescription drug advertising, and also the benefits of advertising in general, through our sponsorship of the Global Insight study.
2. Food Advertising and Obesity: ANA helped get the Children and Media Advancement Act (CAMRA Act) (S. 1902) revised from a demonstration study into the effect of media, including advertising, on obesity, to a more comprehensive analysis of the impact of media on childhood development. We also successfully opposed proposals in California and New York to impose a tax on food and beverage advertising. ANA has been at the forefront of the effort to educate the public, policy makers, and interest groups on the industry's proactive steps to overcome the U.S. obesity problem, as highlighted by our participation on panel discussions at the Kaiser Family Foundation and the NAD Conference on food advertising and children.
3. Indecency and Violence in Media: The 109th Congress dramatically increased fines from \$32,500 to \$325,000 per indecency violation. ANA wrote to members of the Senate Commerce Committee opposing three amendments to the Senate's Telecom bill that would impose severe restrictions on the display of website addresses during children's programming and that would extend

commercial time limits in children's television to other forms of video programming. We opposed another legislative proposal to give the FCC authority to restrict "violent" programming on television. We also filed a "friend-of-the-court" brief in a case against Utah's "child protection" email registry. The industry reached an agreement with the FCC over the revisions to its rules regarding advertising during children's programming. ANA had joined in a lawsuit challenging the FCC's new rules.

4. Direct-to-Consumer Prescription Drug Advertising: ANA, as part of The Advertising Coalition, met with Senate Health, Education, Labor and Pensions Committee staffers regarding advertising provisions in Chairman Mike Enzi (R-WY) and Senator Ted Kennedy's (D-MA) drug safety bill. We continued our opposition to advertising moratoriums, mandatory pre-clearance of ads, or advertising taxes relating to prescription drug advertising.
5. State Advertising Tax Proposals: ANA faced significant ad tax proposals in Texas and Pennsylvania. In Pennsylvania, we helped lead a successful effort to convince the legislature of the adverse impacts of an ad tax, and a budget was ultimately passed without one. We responded in Texas by once again engaging a lobbyist in Austin for the legislature's special session on school financing. Ultimately, a tax was passed that may result in a back door tax on advertising, and we continue to work on this issue, which will go into effect in 2008.
6. Privacy and Information Security: We continued to monitor developments regarding data security, which recaptured the attention of Congress as a number of high-profile security breaches made headlines. We discussed the impact of these issues with key legislators and staff. Also, general privacy issues emerged again, with significant legislation proposed by Senator Hillary Rodham Clinton (D-NY), among others.
7. Alcohol Beverage Advertising: ANA provided testimony to the California Senate opposing legislation that would prohibit alcohol beverage advertising that "targets minors and encourages consumption by minors." The legislation was vague, overly broad and would have restricted legitimate advertising to adults. The legislation was changed in committee into a report on alcohol beverage use by underage consumers.
8. Tobacco Litigation: ANA filed two "friend-of-the-court" briefs in cases regarding tobacco advertising in California. One case alleged that tobacco advertising "glamorized" tobacco sales and made smoking appealing to minors, and thus was promoting an allegedly "illegal" sale. Our brief was developed by noted First Amendment expert Floyd Abrams. He pointed out, among other things, that portraying a legal product as attractive is not a sufficient basis for restricting its advertising. In the other case, it was alleged that tobacco advertising had made

false representations about the health effects of smoking. The first case is still pending.

9. Comments to U.S. Codex Delegation: We filed comments with the United States Delegation to the Codex Committee on Food Labeling opposing a Canadian proposal to include a definition of advertising within the guidelines for Use of Nutrition and Health Claims. We argued that since there are significant cultural, social and educational differences among nations, a definition of advertising is best left up to individual governments.
10. Outdoor Advertising: ANA wrote to members of the House Appropriations Committee supporting a Senate amendment to allow the rebuilding of storm-damaged billboards in areas affected by last year's hurricanes. While the amendment was not included in the supplemental appropriations act, it was later included in the Senate's version of the 2007 Energy and Water Appropriations bill. This bill, however, did not pass before the 109th Congress adjourned, and we will continue to pursue this issue.
11. California Class Action Brief: We filed a "friend-of-the-court" brief with the California Court of Appeal in a class action alleging false advertising by Pfizer for Listerine. Our brief argued that since California had changed its standard for certifying class actions by referendum in 2004, each member of the class had to suffer an actual injury, and in this case, no injury to each member was alleged. The Court of Appeal agreed with our position, protecting marketers from frivolous class action suits. This case presently is under appeal. We will continue to pursue this important issue.
12. SAG/AFTRA Contract: ANA's negotiating team, in conjunction with the ANA/AAAA's Joint Policy Committee, helped reach an agreement on a new commercial actors' contract with the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA). The contract was extended for two years until 2008. Among other major provisions, it calls for a comprehensive independent research study to be launched to examine alternative methods to compensate performers for their participation in commercials appearing on television, radio and the growing array of new media.

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

If you have questions about any of these issues, please contact ANA's Washington office at 202-296-1883.

Dan Jaffe; Executive Vice President, Government Relations; djaffe@ana.net
Keith Scarborough; Senior Vice President, Government Relations; kscarborough@ana.net
David Buzby; Legislative Analyst; dbuzby@ana.net
Meghan Salome; Executive Assistant/Office Manager; msalome@ana.net
Joshua Nadas; Administrative Assistant/Receptionist; jnadas@ana.net

Impact of the 2006 Midterm Elections on Marketers

In the 2006 midterm elections, the Democratic Party regained control of the United States Senate for the first time since 2002 and the House of Representatives for the first time since 1994. While many of our issues do not break down neatly on partisan lines, this shift in party control may still have a significant impact for marketers on many fronts. This includes issues such as children's advertising, food advertising and obesity, direct-to-consumer prescription drug advertising, and privacy.

One of the most important developments in the 110th Congress will be the significant changes on the oversight committees for the advertising industry. On the Senate side, Senator Ted Kennedy (D-MA) will take over at the helm of the Health, Education, Labor and Pensions (HELP) Committee. Senator Kennedy has been critical of DTC prescription drug, alcohol beverage, and tobacco ads in the past. Senator Tom Harkin (D-IA), a persistent critic of food advertising, will take over the Agriculture, Nutrition and Forestry Committee. He has championed highly restrictive food advertising proposals. However, on the Commerce, Science and Transportation Committee, new chairman Daniel Inouye (D-HI) will likely institute what he characterizes as a "co-chairmanship" with ranking Republican Ted Stevens (R-AK), which means there may not be as significant changes in the operation of this important committee.

On the House side, Representative John Dingell (D-MI) will return as chairman of the Energy and Commerce Committee, a position he held from 1981 to 1995. Representative Ed Markey (D-MA) will take over the Energy and Commerce Committee's Telecommunications and the Internet Subcommittee, which has jurisdiction over broadcast advertising and online privacy issues. Congressman Markey is an important voice on privacy issues. At the House Ways and Means Committee, which has important tax-writing responsibilities due to the Constitution's requirement that all tax bills originate in the House, the new chair will be Representative Charlie Rangel (D-NY). Congressman Rangel has long been a friend of the advertising industry. Also in the House, the Ways and Means Committee and Energy and Commerce Committee both have jurisdiction over health issues, and each has a Health Subcommittee. At Ways and Means, the chairman of the Health Subcommittee will be Representative "Pete" Stark (D-CA); and at Energy and Commerce, Representatives Henry Waxman (D-CA) and Frank Pallone (D-NJ) will have prominent roles on that committee's Health Subcommittee. All three have been highly critical of advertising as it relates to various health issues.

Here is a brief summary of how the change in party control may impact various advertising and marketing issues:

- **Food marketing:** As noted, Senator Harkin will be the new chairman of the Senate Agriculture Committee. He is also a senior member of the Senate HELP Committee. Both of these positions will provide him with a platform for further action in this area. In the past Congress, he has introduced legislation to restore the FTC's unfairness

authority regarding food advertising to children and to institute a “good food/bad food” standard for foods sold in schools.

- Children’s marketing: In the past Congress, a bipartisan group of Senators worked on legislation to study the impact of advertising on childhood development including Senators Hillary Clinton (D-NY), Joe Lieberman (I-CT) and Sam Brownback (R-KS). We would expect this activity to continue. Also, as part of the telecommunications reform bill, Senators John Rockefeller (D-WV) and Mark Pryor (D-AR) pushed for restrictions on interactive children’s marketing. As the telecom bill did not pass in the last Congress, this issue may return again.
- Direct-to-Consumer Prescription Drug Advertising: In the last Congress, there were a number of proposals to impose a moratorium on DTC advertising. Most significantly, a drug safety bill pushed by outgoing HELP Committee Chairman Mike Enzi (R-WY) and incoming HELP Committee Chairman Ted Kennedy (D-MA) included a two-year moratorium. The drug safety bill had bipartisan support and may reemerge this year. Other proposals to restrict DTC ads were made by Representative Sherrod Brown (D-OH), who was elected to the Senate and has secured a seat on the HELP Committee, Representative Rosa DeLauro (D-CT), and Representative Jerrold Nadler (D-NY).
- Privacy: Privacy is one of the truly bipartisan issues. The outgoing Chairman of the Energy and Commerce Committee, Representative Joe Barton (R-TX) is a strong advocate of enhanced privacy protections. He has indicated that privacy will remain a top priority for him in his new role as ranking Republican. As noted above, Congressman Markey will take over the Telecommunications and Internet Subcommittee. In the Senate, Senators Hillary Rodham Clinton (D-NY), Dianne Feinstein (D-CA), and Richard Shelby (R-AL) called for stronger privacy laws in the last Congress.

Continuing deficits, the ever-increasing national debt, and the costs of an ongoing war could also lead to focusing on finding new funding sources for major federal initiatives, including restrictions or partial bans on the deductibility of advertising costs. As Congressmen and Senators convene for the 110th Congress in January, we plan actively and systematically meeting with the new Chairmen and members on relevant committees. It is important that we educate members on the importance of advertising to the nation’s economic health.

Advertising Tax Deductibility

Background

Advertising in the United States has been estimated to be a nearly \$300 billion industry annually. Additionally, as Global Insight reported for The Advertising Coalition in 2004, the ad industry provides even greater benefits through the generation of additional economic activity and job creation. The report found that advertising creates more than \$5 trillion in economic activity, both directly and indirectly. The industry also is responsible for the creation of 21 million jobs, or 15.2% of the total U.S. workforce.

At the federal level, advertising, like all other ordinary and necessary business expenses, is fully deductible in the year in which the expense is made. Because it is such a substantial business category, taxes on advertising are viewed as an inviting political target as a potential major new revenue enhancer. The last time a broad across-the-board ad tax deduction proposal was voted on in the Congress was in 1991 during the Administration of George H.W. Bush. The industry successfully fought off this attempt. Since then, ad taxes increasingly have been viewed as a way to limit advertising for “disfavored” products. In fact, most of the current ad tax proposals before Congress are category-specific. We also face ad tax proposals, both on an across-the-board basis and for specific categories in various states every year. 2006 was no exception. These are discussed in-depth beginning on page 11.

Congressional Activity

Many of the proposals considered by Congress in 2006 related to direct-to-consumer prescription drug advertising. Representative Jerrold Nadler (D-NY/8) would prohibit entirely the deductibility of expenses for DTC advertising, while Representative Michael Michaud (D-ME/2) would disallow it if drug manufacturers do not enter into rebate agreements with the Department of Health and Human Services, in order to lower the cost of drugs for people without access to them.

Another proposal, similar to those made in recent years in conjunction with reimportation of prescription drugs from other countries, was offered during committee consideration of the budget resolution by Senator David Vitter (R-LA). Senator Vitter proposed a Sense of the Senate Resolution as an amendment (No. 3065 to S. Con Res 83) that would have forced pharmaceutical companies to take a deduction for advertising expenditures that equals only half their previous year’s budget for research and development. The amendment would have also created a new tax incentive to give back the lost deduction if the companies divert their spending to developing and deploying improved drug packaging and enhanced safety technologies. The Senate Budget Committee did not vote on the amendment, and it was not included in the final resolution.

In addition, Senator Tom Harkin (D-IA) proposed, in his HeLP America Act (S. 1074), to totally disallow any deduction for tobacco advertising.

Outlook for 2007

An across-the-board advertising tax always is a possibility, particularly during this period of monetary expenditures for the war in Iraq, general anti-terrorism measures, the clean up after Katrina, and rising Medicare and Medicaid payments. Additionally, category-specific ad taxes are viewed by some in Congress as a way to limit advertising that is seen as “controversial.” The takeover of Congress by the Democrats may also mean a return to “PAYGO,” which means any legislation mandating new spending requirements has to be offset by revenue enhancements (meaning either tax raises or spending cuts). Any tax cut proposals could lead to “balancing” proposals such as the disallowance of the ad deduction. ANA will continue to educate policy makers of the importance of the advertising industry to the health of the U.S. economy.

State Advertising Tax Deductibility

Background

ANA traditionally confronts advertising tax proposals in a number of states every year. Over the last 20 years, ANA has helped defeat over 120 proposals in more than 40 states. Most states have recovered from the economic downturn of the first part of the decade and are now running budget surpluses. Despite this fact, we still confronted ad tax proposals in a few states in 2006, most notably in Pennsylvania and Texas.

We have always believed that advertising taxes on the state and local level are economically counterproductive. Nearly all states that have passed some type of advertising tax, including Florida, Arizona, Iowa, and Connecticut, eventually have come to agree with us and repealed their tax. As demonstrated by a number of detailed economic research studies, advertising benefits the economy in many ways, and taxing it is not only economically unsound but also a negative signal to business.

ANA is a founding member of the State Advertising Coalition (SAC), which works with marketers and other industry groups to oppose ad tax proposals. We also are a member of The Advertising Coalition, which has worked to educate state officials, through our sponsorship of the Global Insight study, directed by Nobel Laureate in Economics Lawrence Klein, which tracked the economic impact of advertising in every Congressional district in the United States, concerning the economic benefits of advertising to state economies.

State Ad Tax Proposals

Pennsylvania

Pennsylvania considered a proposal (Senate Bill 854) for property tax relief in January. The plan passed by the state House of Representatives in late December 2005 on a 103-92 vote would have expanded the state's 6% sales tax to cover a number of business services, including advertising. The state Senate held a number of hearings on the bill right after the first of the year, and ANA filed comments in opposition to the bill. A budget was ultimately adopted without any tax on advertising.

Texas

Texas has been an area of concern for ANA over the last few years. Texas has no state income tax, and relies on the sales tax at the state level and property taxes at the local level for government funding. It has also been trying to develop a system to finance public schools in the state after the prior system was invalidated by the state courts. In April, Texas Governor Rick Perry (R) announced plans for a special session to address school funding. One of the provisions in the final bill that resulted from the session (HB3) could be interpreted as a back-door tax on advertising. Under the proposal, a company that elects to subtract the cost of goods sold for the purpose of computing its tax liability can include a number of direct costs, including labor costs, materials, and

research and development costs, among others. However, companies are precluded from including selling costs and advertising costs in the calculation.

We hired a local lobbyist in Austin and worked with the Texas broadcasters, newspaper publishers and other industry groups to try to get this provision removed. The Texas House passed the bill in April, and there was considerable pressure on the Senate to follow suit. It passed the bill in May. We had hoped for a “clean up” bill in the special session that would remove the tax, but this effort finally collapsed due to the desire to speed deliberations in order to reach final agreement. The tax does not take effect until 2007, with the first collections in 2008.

We are continuing to work with our local lobbyist and other industry groups to determine whether to attempt to have the advertising provision repealed during the regular session of the legislature in January.

There are also a number of category specific ad tax proposals relating to food advertising which are described on page 13.

Outlook for 2007

Most states are in good fiscal shape at the moment, so the need to find new sources of revenue has abated. Nevertheless, while there were fewer state ad tax proposals in 2006 than we saw in the past few years, if the economy experiences a downturn, we would expect to see a renewed focus on such ad tax efforts. In the meantime, our continuing program to educate state policymakers on the benefits of advertising through the Global Insight study will be accelerated.

Food/Beverage Advertising and Obesity

Background

Food advertising continues to be attacked by a number of critics as a major cause of the rising obesity rates in the United States, especially in regard to children. Many groups, such as the Center for Science in the Public Interest (CSPI) and the Institute of Medicine (IOM), seek to severely limit and restrict food advertising through guidelines restricting the types of foods that can be advertised. In 2006, these calls for guidelines translated into legislation on both the federal and state levels. Concerns were also raised about the emergence of food marketing to children online. Interest groups continued their assault on food marketing in the courts as well.

ANA believes that there are a number of major factors that play a role in the rise of obesity in the United States. Bans or sweeping restrictions on advertising, however, while they may attract headlines, will not solve the problem. It will take coordinated systematic efforts to meet this challenge. The food, beverage and restaurant industries have been consistently accelerating their efforts to provide the public improved means to combat and avoid the threat of obesity. In just the past three years, the food industry has introduced at least 4,500 new or reformulated low-fat, low-calorie, and low-carb products. Restaurants, including quick-service establishments, also have introduced numerous new offerings such as salads, yogurt, and fruit. The industry's self-regulatory body for children's advertising, the Children's Advertising Review Unit (CARU, <http://www.caru.org>), completed a substantial review and strengthening of their advertising guidelines to adapt to changing circumstances, including online marketing and interactivity with company websites. The industry is also working with the Ad Council in developing public service campaigns directed at both children and adults, such as the Small Step campaign (<http://www.smallstep.gov>), the campaign directed specifically at children, called "Can Your Food Do That?" (<http://www.smallstep.gov/kids>) and programs directed at minority groups. ANA supports properly focused Congressional action as well, including Senate Majority Leader Bill Frist's IMPACT bill (S. 1325), which would establish community education programs on good nutrition and physical activity. The industry also has created the American Council on Fitness and Nutrition (ACFN, <http://www.acfn.org>) to undertake major anti-obesity programs in various regions of the country. In all, the food industry and advertising community have strongly exhibited their commitment to a healthier America.

Congressional Activity

Senator Tom Harkin (D-IA) continued his regulatory focus on the food industry in 2006. In 2005, he introduced the Healthy Lifestyles and Prevention America Act (S. 1074, or the HeLP America Act), which would have restored the Federal Trade Commission's unfairness authority as it relates to children's advertising. He followed this up with the Child Nutrition Promotion and School Lunch Protection Act of 2006 (S. 2592), which required the Department of Agriculture to establish guidelines for foods sold in schools

based on their nutritional value. Companion legislation was introduced in the House by Congresswoman Lynn Woolsey (D-CA/6). This “good food/bad food” model is similar to what some groups, including the Institute of Medicine (IOM), would like the government to adopt. This legislation was also similar to Senator Ted Kennedy’s Prevention of Childhood Obesity Act (S. 799), introduced in 2005, which would also require the government to establish guidelines for food marketing.

Senator Harkin also procured funding for an FTC report on ad spending in all media for food advertising to children, through an amendment to an appropriations bill. That study is due in 2007.

Also in the Senate, the Senate Health, Education, Labor and Pensions Committee considered the Children and Media Research Advancement Act (S. 1902, or the CAMRA Act), sponsored by Senators Joe Lieberman (D-CT), Hillary Clinton (D-NY), Rick Santorum (R-PA), and Sam Brownback (R-KS), among others, in March. While the original bill called for a demonstration study into the effect of media, including advertising, on childhood obesity, a substitute amendment adopted by the committee mandated the Centers for Disease Control and Prevention to look into the impact of media on childhood development in general. The amended bill passed the Senate by unanimous consent in September, but was not taken up by the House of Representatives.

Finally, on the other side of the Capitol, District of Columbia non-voting Delegate Eleanor Holmes Norton (D) introduced legislation (H.R. 5737) to restore the FTC’s unfairness authority for children’s advertising. Introduced in June, it was referred to the House Energy and Commerce Committee.

State Activity

California

In April, State Senator Liz Figueroa introduced a bill (SB 1118) to impose a tax of unspecified percentage on ads for foods of “poor nutritional quality” between 7:00am and 10:00pm. The proceeds of the tax would be used to address childhood obesity and other obesity-related health issues. The Senate Health Committee considered the bill in May, but no further action was taken on it. ANA submitted testimony in opposition to the bill.

New York

In 2005, State Assemblyman Felix Ortiz introduced legislation (AB 5665) to impose an additional ¼% tax on food and beverages, and on the sale and rental of video games and DVD’s. It would also take away the ad deduction for food advertisements aired in New York during programs primarily watched by children under 18. After Assemblyman Ortiz indicated that he would attempt to push the bill last January, ANA was in touch with members of the Assembly Ways and Means Committee to express our strong opposition to the bill.

CSPI Lawsuits

In January, CSPI announced its intention to file a lawsuit against Kellogg and Viacom in Massachusetts charging them with false, deceptive and unfair acts or practices by marketing “junk foods” to children under eight. The suit sought to take advantage of a Massachusetts law which carries a minimum penalty of \$25 for each violation. A violation would occur each time an advertisement was aired or placed on packaging, creating the potential for damages in the billions of dollars. CSPI also planned to ask the court to enjoin the companies from marketing during programs where more than 15% of the audience was under eight. The suit has yet to be filed.

CSPI did file suit, however, against KFC in the District of Columbia Superior Court. This suit alleges KFC deceived consumers by hiding the fact that it used partially hydrogenated oil containing trans fats, and violated its duty of care by doing so. It singled out claims made by KFC in ads and on its website representing its food as part of a healthy lifestyle. The suit sought to enjoin KFC from using trans fats. CSPI intimated that similar suits were likely against other family and quick-service restaurants for the use of trans fats. This particular suit was dropped when KFC agreed to change its oil.

Interactivity with Online Food Advertising

Kaiser Family Foundation Interactivity Report and Panel Discussion

The Kaiser Family Foundation, a non-profit organization that focuses on health issues, released a report in July that was the first of its kind to examine online interactive marketing and obesity. Online marketing is still a very small part of total ad spending, constituting about 4.7%. While the report criticized online interactive marketing, in fact it noted some positive steps taken by the food industry in this area. It found that 72% of websites displayed some sort of nutritional information about the product, as well as unanimous compliance with the Children’s Online Privacy Protection Act (COPPA). ANA participated in a panel discussion that took place the day of the report’s release, where we discussed many of the positive steps the industry is taking to respond proactively to help the U.S. overcome the obesity problem.

More information on interactivity as it relates to the children’s advertising arena in general can be found in the section on Media Content and Child Protection, beginning on page 21.

IOM Report

The Institute of Medicine introduced an interim report in September that gauged the progress made in combating obesity, and how to accurately assess further progress. In regard to advertising community efforts, the report recommended that industry create a mechanism to share proprietary data to enhance the understanding of how marketing

influences attitudes and behavior in regard to obesity, and to provide HHS and USDA with data in this area as well. It also called on individual industry members to evaluate the proportion of their marketing resources devoted to developing and promoting healthful products, to monitor changes in product portion sizes, and ensure that industry is conveying consistent information to consumers that support a healthy lifestyle. The IOM recommended industry partner with public institutions to support childhood obesity prevention efforts. It calls on industry to support the revision of the CARU guidelines and support their expansion to further marketing practices. Past IOM reports have criticized the advertising industry and called for government regulation limiting advertising on a “good food/bad food” basis, including giving industry two years to “balance” food advertising in the media. If industry failed to act, the IOM called on Congress to step in with legislation.

Childhood Obesity Taskforce

In September, Senator Sam Brownback (R-KS), Federal Communications Commission Chairman Kevin Martin and FCC Commissioner Deborah Taylor Tate announced the creation of a Task Force on “Media and Childhood Obesity: Today and Tomorrow” to examine the role of media and advertising on children’s health. The Task Force plans to meet with representatives from children’s programming, the food industry, consumer groups, and government officials. ANA has been asked to join the Task Force. Other members of the Task Force include The Walt Disney Co., Children Now, and the Parents Television Council.

CARU Review

In November, the Children’s Advertising Review Unit (CARU) announced its substantial revision to its self-regulatory guidelines. The new guidelines give it more power to go after “unfair” advertising and address concerns such as the blurring of advertising and programming and ads in interactive games. The new guidelines can be viewed at <http://www.caru.org/guidelines/index.asp>. The Council of Better Business Bureaus (CBBB) also created a new 10 member initiative designed to shift the mix of advertising messaging to children to encourage healthier dietary choices and healthy lifestyles. More on the initiative can be found at <http://www.cbbb.org/initiative/>.

Outlook for 2007

Until there is a marked change in obesity rates, food, beverage, and restaurant marketers will remain high-profile targets for legislation. Congress is under increasing pressure to “do something” in this area, as are many governments in other parts of the world. This may lead to proposals in the next year to attempt to severely limit or ban advertising, especially during certain dayparts on television or in certain publications. We believe that the revisions being made to CARU’s already strong self-regulatory guidelines will help ensure that advertisers are reaching age-appropriate audiences with materials taking into account the special needs of those watching. It will couple these efforts with its

stringent enforcement activities, which include the power to refer cases to the Federal Trade Commission. ANA remains committed to finding solutions that do not restrict the rights of marketers to advertise their products.

Direct-to-Consumer Prescription Drug Advertising

Background

Direct-to-consumer (DTC) prescription drug advertising is one of the fastest growing ad categories. Because of the continued rise in the price of prescription drugs some policymakers at the federal and state levels have tried to link the two issues together, leading to proposed restrictions on advertising. Many of these restrictions would limit the tax deductibility of advertising expenses. Additionally, as problems with specific drug products have led to recalls, there have been a number of proposals to place moratoriums or additional warnings on advertising.

These restrictive proposals often ignore the significant educational benefits of prescription drug advertising in our health care system. Study after study, whether conducted by consumer groups, medical associations, or the government, has demonstrated that DTC advertising is an important public resource to combat diseases and provides public awareness of new treatment options. DTC ads often provide critical information about serious health conditions of which the viewer may not be aware, and encourage them to visit a doctor. In addition, the prescription drug industry's major trade group, the Pharmaceutical Research and Manufacturers Association (PhRMA) recently has issued detailed self-regulatory principles to help guide drug marketers in fashioning their marketing campaigns. These self regulatory guidelines supplement the already powerful federal regulatory regime which provides strong governmental oversight of prescription drug advertising. The guidelines can be viewed at [http://www.phrma.org/direct to consumer advertising/](http://www.phrma.org/direct_to_consumer_advertising/). ANA also is a member of The Advertising Coalition, which seeks to educate policymakers and staffers about the benefits of prescription drug advertising.

Congressional Activity

In July, Senators Mike Enzi (R-WY) and Ted Kennedy (D-MA), the Chairman and ranking member of the Health, Education, Labor and Pensions (HELP) Committee respectively, introduced a bipartisan drug safety bill. The bill, the Enhancing Drug Safety and Innovation Act of 2006 (S. 3807) included a provision that allowed the FDA to require drug manufacturers to submit advertisements for preclearance to the Food and Drug Administration (FDA) as part of the agency's evaluation of the potential risk of adverse reactions from specific drugs already in the marketplace. The legislation also allowed the imposition of a two-year moratorium on advertising for new prescription drug products. The Advertising Coalition held extensive meetings with committee staff and wrote to committee members regarding this bill to oppose this overly restrictive approach. A hearing was held by the HELP Committee on this bill in November, at which DTC advertising was extensively discussed. A representative from Consumers Union urged the committee to adopt a three-year moratorium. Additionally, Representative Henry Waxman (D-CA) pledged to work with the Senate on drug safety legislation in the next Congress.

Additional blanket moratoriums on drug advertising were also pending before Congress. In 2005, both the advertising industry trade publication *Advertising Age* and Senate Majority Leader Bill Frist (R-TN) made high-profile proposals for one- or two-year moratoriums on advertising. The stated goal of these moratoriums was to allow time for potential drug risks to be sorted out. In addition, both Representatives Sherrod Brown (D-OH/13) and Rosa DeLauro (D-CT/3) had separate ad moratorium bills pending. Congressman Brown's bill, the Medical Advertising Reform Act (H.R. 3696) mandated a two year moratorium, while Congresswoman DeLauro's bill, the Responsibility in Drug Advertising Act, would impose a three year moratorium.

While a bill proposed by Senator Charles Grassley (R-IA) and Representative John Tierney (D-MA/6) would not propose a moratorium on advertising, it would require drug manufacturers to include substantial additional warnings for drugs deemed to be an "unreasonable risk" to patient health (S. 930/H.R. 4429). The House version was introduced late in 2005.

During Senate Budget Committee consideration of the 2007 budget resolution, Senator David Vitter (R-LA) offered a Sense of the Senate Resolution as an amendment (No. 3065 to S. Con Res 83) during markup that favored limiting pharmaceutical companies to taking a deduction for advertising expenditures that equals only half their previous year's budget for research and development. It would have created a new tax incentive to give back the lost deduction if the companies would divert their spending to developing and deploying improved prescription drug packaging and other safety technologies. This approach was similar to a proposal put forth during debates over reimportation of prescription drugs from other countries. The committee did not act on the amendment.

IOM Drug Safety Report

In September, the Institute of Medicine (IOM) issued a report entitled, "The Future of Drug Safety: Promoting and Protecting the Health of the Public." The report severely criticized the participants in the drug approval process and safety monitoring, including the FDA and industry. The committee made three major recommendations in regard to advertising. First, it called for a two to three year moratorium on the advertising of new prescription drugs. Second, it called for mandatory preclearance of all existing drugs. Third, it called for eliminating some of the ad deduction for prescription drugs to pay for greater FDA oversight of DTC advertising.

GAO Report

The Government Accountability Office (GAO) released a report in December that was requested by Senate Majority Leader Bill Frist (R-TN) in 2004. The report found that the Food and Drug Administration was issuing fewer warning letters for drug ads that

were false and misleading. The report recommended that the FDA prioritize and track all materials it receives for review.

Outlook for 2007

Activity in the prescription drug advertising area is extremely likely next year. We anticipate that the Enzi-Kennedy proposal will be a major legislative vehicle for ad restrictions. The IOM report will provide ammunition in this battle for our critics. ANA, through The Advertising Coalition and independently, will continue our efforts to inform policymakers in an effort to prevent serious restrictions on DTC prescription drug advertising to be imposed. Any restrictions on DTC advertising would raise serious First Amendment concerns.

Media Content and Child Protection

Background

Restricting indecent or violent programming under the rubric of “child protection” took on new life after the controversial Super Bowl “wardrobe malfunction” in 2004. In 2006, two years of debate led to final legislative action regarding broadcast indecency. The legislation increased the fines the Federal Communication Commission (FCC) can impose by a ten-fold amount to \$325,000 per violation. Violence in various types of media, including on broadcast television and in video games also continued to attract attention in Congress. In addition, new concerns over interactivity with online media emerged in the legislative arena in 2006. Nearly every commissioner on the FCC, Democrat and Republican alike, have indicated their desire to crack down on what they see as an increase in indecent and violent material on the airwaves.

ANA believes that it is important for parents to effectively monitor the programs their children watch. Both the media industry and Congress have provided parents with a number of effective tools, including ratings systems and the v-chip, to make their job easier. The media industry is undertaking a major education campaign to alert parents of the availability and appropriate use of these tools (<http://www.thetvboss.org>). ANA has also created the Family Friendly Programming Forum, a coalition of over 40 major advertisers who are taking positive steps in increasing the amount of family-oriented entertainment on television available to parents. More information on the Forum is available at <http://www.ana.net/family/default.htm>.

Congressional Activity

Indecency

Two indecency bills, one in the Senate and one in the House, introduced early in 2005 finally gained traction in 2006. In the Senate, Senator Sam Brownback (R-KS) introduced the Broadcast Decency Enforcement Act (S. 193) to raise fines for indecent, obscene or profane broadcasts to \$325,000 per violation. In the House, Representative Fred Upton (R-MI/6) introduced a similarly titled bill (H.R. 310) to increase fines to \$500,000 per violation. Congressman Upton’s bill also made it easier for the FCC to fine individuals for obscene or indecent acts, and would have required the FCC to hold a license revocation hearing after three violations. Congressman Upton’s bill overwhelmingly passed the House in February 2005, but action in the Senate stalled over whether to accept the higher limits in the House passed bill or the lower fines found in Senator Brownback’s version. Senator Brownback’s bill passed the Senate in May 2006, and after negotiation between the Houses, was agreed to by the House in June. President Bush signed the bill into law a few days later.

Media Impact on Childhood Development

Also in the Senate, Senators Joseph Lieberman (D-CT), Hillary Rodham Clinton (D-NY), Sam Brownback (R-KS) and Rick Santorum (R-PA) reintroduced the Children and Media Research Advancement Act (S. 1902, or the CAMRA Act). The language in the bill as introduced called for a demonstration study into the effect of media, including advertising, on childhood obesity. This provision was dropped in the substitute amendment that passed out of the Senate Health, Education, Labor and Pensions committee. The new version requires the Centers for Disease Control and Prevention to look into the impact of media on childhood development in general. The amended bill passed the Senate by unanimous consent in September, but was not taken up in the House of Representatives. Representative Ed Markey (D-MA) has a companion bill to the original version in the House.

Media Violence

On the issue of media violence, legislation introduced by Senators Jay Rockefeller (D-WV) and Kay Bailey Hutchison (R-TX) in 2005 required the FCC to examine television ratings systems for effectiveness in rating violence. Under the bill, if the Commission determined the ratings systems were not “effective,” it could ban such programming. The bill allowed local broadcasters to preempt any programming they find objectionable, and required 30-second content warnings, both visual and aural, at the beginning of a program and after every additional 30 minutes of a particular program.

Amendments to the Telecom Bill: Violence, Interactivity and Commercial Limits

In June, the Senate Commerce, Science, and Transportation Committee considered a broad rewrite of the nation’s telecommunications laws. Three amendments added to the bill (H.R. 5252) dealt with media issues. Two were introduced by Senator Jay Rockefeller (D-WV). The first required the FCC to complete its Notice of Inquiry on violent programming and its effects on children. The second prohibits interactivity with commercial matter during children’s programming. Under this amendment, no children’s program could include information about that program’s website, even if the link contained purely educational material if the site carried out any brand promotion. We noted that there is substantial data demonstrating that children often go to these sites directly and that making this type of activity illegal because it is connected to interactive links is both counterintuitive on policy grounds and highly likely to violate the First Amendment.

The other amendment, introduced by Senators Mark Pryor (D-AR) and Bill Nelson (D-FL), imposes broadcast-type limits (12 minutes during the week and 10.5 minutes on the weekend) on commercial matter appearing in all other video media. It is not clear how the commercial time limits would work in regard to new video technologies such as the Internet and wireless services where advertising often is available on a 24/7 basis.

ANA wrote to the members of the committee stating our concerns with all three amendments. We argued that these proposals would have the effect of severely limiting media innovations and new communication technologies. Our letter can be viewed at

http://www.ana.net/news/2006/Letter_on_HR_5252_Stevens.doc. The bill became bogged down due to other issues, including “net neutrality,” and did not see floor action before the end of this Congress but is likely to be attempted to be revived in the 110th Congress.

Lawsuits Challenging the FCC Indecency Regulations

In March, the FCC handed down a large number of monetary fines, equaling almost \$4 million. Its most notable action was affirming the \$550,000 fine against CBS for the Janet Jackson “wardrobe malfunction” during Super Bowl XXXVIII. It also assessed fines against CBS for an episode of “Without a Trace” and against the WB for an episode of “The Surreal Life.” The Commission also found indecent and profane several television programs containing offensive language. The FCC included among these decisions a fine for an ad promoting a DVD that aired on a San Juan, Puerto Rico television station. It found the ad violated “community standards” for broadcast television, and assessed a total fine of \$220,000 against the station. As far as we are aware, this is the first time an advertisement has been found to be indecent by the FCC.

From almost the time of their promulgation, these fines have been tied up in litigation. A federal court recently granted the FCC a second chance to review some of its profanity rulings. The court determined that the FCC should have made its decisions available for comment before taking final action.

Lawsuit Against the FCC’s Children’s Rule Changes

In October 2005, ANA petitioned to intervene in a suit asking for judicial review of the FCC’s revisions to its rules regarding advertising during children’s programming. The suit was filed by Viacom and The Walt Disney Co., both ANA members. The parties reached a settlement in December 2005, filing a Joint Proposal to the FCC, whereupon the FCC opened comment on the matter in March. The Joint Proposal refined the rule regarding placement of website addresses in programming and removed promotional material from the time limits for commercial limits for children’s programming. At its open Commission meeting in September, the FCC approved the terms of the Joint Proposal by approving a Second Order on Reconsideration and Second Report and Order. This action led to the successful closing of the lawsuit.

Children Now Conference

Children Now, a California based child advocacy group, convened a conference in Washington in July to examine interactivity in children’s marketing. Senator Hillary Rodham Clinton (D-NY) and FCC Commissioners Michael Copps and Jonathan Adelstein each spoke to the group. All three were highly critical of the advertising industry. Senator Clinton argued that marketers are conducting a “massive experiment” on our nation’s children. Commissioner Copps argued that children have become “commodities” to be sold to marketers. Commissioner Adelstein repeated a comment made to other

audiences that “nothing good comes from marinating our children’s brains in advertising and violent programming.” The FCC commissioners also stated their opposition to interactivity with commercial matter, such as the display of a company website, during children’s programming.

AAP Report

In December, the American Academy of Pediatrics issued a report entitled “Children, Adolescents, and Advertising” calling for new restrictions on ads for tobacco, alcohol beverages, prescription drugs and certain foods and beverages. Specifically, it called on the government to ban “junk food” advertising during children’s programming; require alcohol beverage ads to show only the product being advertised; and limit the airing of ED drug ads to after 10:00pm. It also called for the government to reduce by one-half the number of TV commercials allowed during children’s programming. This act, if implemented, would allow only 6 minutes per hour of children’s advertising during children’s programming on weekdays and 5.25 minutes per hour on weekends. The text of the AAP report is available at www.aap.org/advocacy/releases/dec06advertising.htm

Dan Jaffe’s blog, at <http://ana.blogs.com/jaffe> describes in more detail the defects with the AAP report.

Child Protection Registries

In the past year, a number of states have considered legislation to create “child protection registries” that would allow parents to register “contact points” such as e-mails that are accessed by children. Once registered, companies that market “adult-oriented” products must scrub their mailing lists against the registry and avoid sending emails to those addresses. Registries have been created in Michigan and Utah, and legislation has been introduced to create them in Illinois, Georgia, and Hawaii. In response, ANA has joined a friend-of-the-court brief in a suit (*Free Speech Coalition v. Shurtleff*) filed in Utah seeking to enjoin enforcement of the law. Our brief argues that the registry is preempted by federal law and violates a number of Constitutional provisions. Our brief also notes that the creation of these types of registries creates a “Fort Knox” of children’s names. This creates a very dangerous and tempting target for hackers. The Federal Trade Commission also is on record warning of these dangers. Our brief can be viewed at <http://www2dev.ana.net/govrel/getfile/29>. The court considered a preliminary injunction of the Utah registry on November 8, 2006.

Outlook for 2007

While the indecency legislation has now been enacted into law, it is almost certain that strong concerns over violent programming and the effects of advertising on childhood development will persist. A few of the Senators who sponsored the CAMRA bill, including Senators Clinton and Brownback, are often named as possible presidential candidates in 2008, which means this issue may become central during the next

presidential campaign. We also are facing a more active FCC in this area and others, including the interactivity issue. ANA believes that congressionally-mandated restrictions on content would run afoul of the First Amendment.

Privacy and Information Security

Background

Privacy and information security issues have wide-ranging implications for advertisers. In an increasingly fragmented marketplace, marketers are using information about consumers to more effectively target their marketing to the appropriate audience. Some of this information could be made unavailable under various proposals that are being considered in Congress, especially as it deals with legislation to address data security.

There are numerous important economic benefits to the free flow of consumer information. These values, however, have to be carefully balanced with adequate protection of sensitive consumer information to assure consumer safety. The Federal Trade Commission (FTC) already has strong enforcement authority in this area under current laws. We also have supported private sector initiatives such as best practices programs, privacy policies, and seal programs, which provide consumers with greater reassurance that their information will be used for legitimate marketing purposes.

Congressional Activity

Data Breach Legislation

Since the Choice Point data breach made headlines in early 2005, it has been estimated that as much as 90 million records containing personal information have been involved in security breaches. A number of bills have since been introduced in Congress to enhance data security. While it seemed likely in 2005 that a bill would pass in the 109th Congress, jurisdictional disputes left these bills tied up in both the House and the Senate.

In the House, the major dispute was between the Energy and Commerce and Financial Services Committees. The Energy and Commerce Committee bill, introduced by Representative Cliff Stearns (R-FL/6) and backed by powerful Chairman Joe Barton (R-TX/6), was the Data Accountability and Trust Act (H.R. 4127, or the DATA Act). This bill required companies to establish procedures for protecting data and notifying consumers in the event of a security breach. It also limited enforcement to the Federal Trade Commission and state attorneys general. The Financial Services bill, introduced by Representative Stephen LaTourette (R-OH/14), was the Financial Data Protection Act of 2005 (H.R. 3997). This legislation contained similar notification procedures, but also allowed consumers who have been victimized by identity theft to place a freeze on their credit information. In June, each committee marked up the other's bill by replacing it with their own. Despite negotiations before the August recess, a consensus bill was not reached. The House Judiciary Committee also marked up H.R. 4127, adding provisions for civil penalties up to \$5,000,000 for violations of the act.

The information security legislation dispute in the Senate included the Commerce, Science, and Transportation, Banking and Financial Services, and Judiciary Committees. The Commerce Committee marked up S. 1408, the Identity Theft Protection Act, in 2005. This bill required notice to consumers within 90 days of a security breach and contained a strong credit freeze provision, allowing anyone to place a freeze on their credit information. Two members of the Banking Committee, Senators Bob Bennett (R-UT) and Tom Carper (D-DE) introduced legislation (S. 3568, the Data Security Act of 2006) dropping the credit freeze and establishing procedures for notice. Meanwhile, the Judiciary Committee bill (S. 1789, the Personal Data Privacy and Security Act of 2005) instituted strong criminal penalties and contains an extremely broad definition of personal information. ANA wrote to the Judiciary Committee opposing an earlier version of this bill, as the definition of personal sensitive data contained in the legislation was overly broad and would have serious adverse implications for marketers who use personal information.

Privacy Legislation

On the general privacy front, Senator Hillary Rodham Clinton (D-NY) gave a speech in June to the American Constitution Society about her intention to introduce what she called a “Privacy Bill of Rights.” Her eventual bill, the Privacy Rights and Oversight for Electronic and Commercial Transactions Act of 2006 (S. 3713, or the PROTECT Act), created a private right of action for consumers in the event of a security breach, and required financial institutions to obtain “opt-in” consent in writing or electronically before sharing consumer information with third parties. The bill also allowed consumers to demand access to any personally identifiable information that a company obtained concerning them and correct any misinformation about them. Like many of the data breach bills, it also allowed consumers to place a freeze on their credit information.

Other comprehensive privacy bills, such as Senator Dianne Feinstein’s Privacy Act of 2005 (S. 116) and Congressman Stearns’ Consumer Privacy Protection Act of 2005 (H.R. 1263), remained pending.

Unsolicited Commercial Email

The Federal Trade Commission issued a status report on the effectiveness and enforcement of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, or the CAN-SPAM Act (15 U.S.C. 7701, <http://uscode.house.gov/download/pls/15C103.txt>). The report found that in response to the Act, many companies have adopted “best practices” for sending unsolicited emails, and had provided law enforcement with significant tools in bringing over 50 cases against spammers. It noted that the level of spam had begun to level off, and along with enhanced consumer tools, meant less spam was ultimately reaching inboxes. The Commission urged further efforts to educate the public about how to protect themselves against the receipt and viewing of sexually-explicit spam.

ANA was one of the major groups involved in securing Congressional passage of the CAN-SPAM Act in 2003. We also established our own set of “best practices” in conjunction with the American Association of Advertising Agencies and the Direct Marketing Association at that time.

Unsolicited Commercial Faxes

In April, the Federal Communications Commission (FCC) adopted rules to implement the Junk Fax Prevention Act of 2005 (S. 714). As required by the Act, the rules allow faxes to be sent to parties with whom the sender has an established business relationship. It also requires a clear and conspicuous notice to be placed on the first page of a fax transmission regarding how to “opt-out” of future communications. As issued, the rules do not, however, include an exemption from the notice requirements for trade associations and non-profits, something that Congress left to the Commission’s discretion. The Commission’s rules can be viewed at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-42A1.pdf.

ANA pressed for Congressional passage of S. 714 in 2005 in response to the FCC’s decision to revise its fax rules and eliminate the established business relationship in 2003.

Children’s Privacy

The Federal Trade Commission completed its review of its rule implementing the Children’s Online Privacy Protection Act, or COPPA. It decided to keep in place the “sliding scale” for obtaining parental consent included in the landmark legislation passed in 1998 with ANA support. Under the legislation, parental consent in the form of a credit card number or a password was required if the company collecting the data intended to disclose the information to the public or a third party. After five years, the FTC could consider whether technology had evolved to the point where the sliding scale was no longer needed. ANA and others in the advertising community argued for an extension of the existing rules. The FTC decided to retain the sliding scale indefinitely while continuing to monitor technological developments. In its report, the FTC noted that COPPA has fulfilled its promise in providing greater protection to children’s personal information online without restraining the viability of children’s websites.

Outlook for 2007

There appears to be a renewed bipartisan impetus towards broad privacy legislation in Washington. We will monitor developments closely in this area when Congress returns early next year. ANA historically has been opposed to proposals, such as a mandatory “opt-in” consent requirement and a private right of action, which we believe would be too restrictive and economically disadvantageous to the advertising community. We believe that some companies will want to utilize an opt-in approach with their customers, but that this should not be a mandatory federal requirement. We will work with members

of Congress and their staffs on any privacy proposals to ensure that a balance between consumer protection and economic benefits is preserved.

Alcohol Beverage Advertising

Background

The alcohol beverage industry works diligently to ensure that its advertising reaches an age-appropriate audience. The industry's main trade groups, the Beer Institute (<http://www.beerinstitute.org>), the Wine Institute (<http://www.wineinstitute.org>) and the Distilled Spirits Council (<http://www.discus.org>), have in place strict codes that determine ad placement and content. The Federal Trade Commission (FTC) has commended these industry codes and industry's willingness to strengthen them in order to assure appropriate targeting to adult audiences. Additionally, the alcohol beverage industry is working to fight underage drinking and drunk driving through activities sponsored by the Century Council (<http://www.centurycouncil.org>), the Ad Council's "Buzzed Driving is Drunk Driving" campaign (<http://www.stopimpaireddriving.org>) and other groups.

However, according to groups such as Mothers Against Drunk Driving (MADD), the Center for Science in the Public Interest (CSPI), and the Center on Alcohol Marketing and Youth (CAMY), these activities are not nearly enough. These and other groups have called for restrictions or total bans on alcohol beverage advertising. These proposals eventually have been translated into various Congressional initiatives. In addition, a number of controversial studies have added fuel to the fire.

Congressional Activity

In 2005, for example, Senator Mike DeWine (R-OH) introduced S. 408, the STOP Underage Drinking Act, which calls for research on "the type and quantity of alcoholic beverage consumed by underage drinkers, as well as information on brand preferences of these drinkers and their exposure to alcohol advertising." There is a similar bill in the House (H.R. 864) sponsored by Lucille Roybal-Allard (D-CA/34). Both remained pending before committees in their respective houses when Congress adjourned.

Additionally, Congressman Tom Osborne (R-NE/3) reintroduced a resolution (H.Res. 145) calling on the NCAA to "discourage alcohol use among underage students and other young fans by ending all alcohol advertising during radio and television broadcasts of collegiate sporting events."

State Activity

In California, State Senator Carole Migden introduced a bill (SB 1180) to prohibit alcohol beverage advertising "in a manner that targets minors and encourages the consumption of alcoholic beverages by minors." ANA and segments of the alcohol beverage community opposed this legislation. We filed testimony written by First Amendment expert Steve Brody of King & Spalding, which argued that the bill would impermissibly restrict speech in violation of the First Amendment, and that it would

impose criminal penalties for inadequately defined offenses. In committee, the bill was changed to a report on alcohol beverage use by underage consumers. The report also would look into advertising practices and industry self-regulation. The bill died at the end of the legislative session.

NAAG Letter to FTC

In May, the National Association of Attorneys General filed comments with the Federal Trade Commission (FTC) in response to its extensive fact-finding initiative in regard to alcohol beverage industry marketing practices. The letter, which was filed by the Youth Access to Alcohol Committee of the National Association of Attorneys General (NAAG), asked the FTC to obtain information on whether the industry's 30% self-regulatory placement standard is appropriate, and whether a 15% standard would be more effective and appropriate to prevent youths from viewing alcohol beverage ads in the media.

CAMY Studies

The Center on Alcohol Marketing and Youth (CAMY) has carried out a series of studies on alcohol beverage marketing and so-called "overexposure" by youth. It issued reports on youth "overexposure" to alcohol beverage ads on television, radio, and magazines in 2006. Surprisingly, however, its study on magazine advertising found that youth exposure to alcohol beverage ads in magazines in fact declined 31% from 2001 to 2004. Another academic researcher, in this case from Pennsylvania State University, Jon Nelson, on the other hand, found that the industry is not targeting teens in its magazine advertising.

Study on Consumption

Dr. Leslie Snyder, a researcher at the University of Connecticut, released a study claiming to be the first to demonstrate a causal link between underage alcohol beverage consumption and ad exposure. Her study claimed that each ad viewed increased the likelihood of alcohol beverage consumption by 1%, and that youth in markets with more alcohol beverage advertising drank more than other youth. Her study, published in January in the Archives of Pediatric and Adolescent Medicine, was seized on by activist groups. However, two other researchers, Dr. Reginald Smart of the Centre for Addiction and Mental Health at the University of Toronto and Dr. Don Schultz of Northwestern University, published refutations of Dr. Snyder's study in the August issue of the Archives of Pediatric and Adolescent Medicine, citing flaws in her methodology and findings. Specifically, they explained that the study results show that those who saw the most advertising over time actually decreased their drinking, and that there were serious methodological problems with a long term longitudinal study where only 31% of respondents were able to be surveyed throughout the entire study period.

Outlook for 2007

There will continue to be pressure on alcohol beverage marketers to further limit their marketing, from various segments in the Congress and activist groups. We will actively monitor congressional actions in this area. It would not be possible to restrict truthful, non-deceptive advertisements of alcohol beverages that primarily reach adults without raising significant First Amendment concerns.

Tobacco Advertising

Background

Tobacco advertising is presently one of, if not the most, highly restricted ad categories in the United States. Many of these restrictions, such as those regarding ad placement and ad content, were imposed by the Master Settlement Agreement reached between the various state attorneys general and a broad segment of the tobacco industry in 1998. However, some in Congress would like to place further restrictions on the industry. In 1996, the Food and Drug Administration (FDA) promulgated sweeping regulations for tobacco products and tobacco advertising. The Supreme Court held in 1998 that the FDA lacked regulatory authority over tobacco products and also tobacco advertising, which historically has been regulated by the Federal Trade Commission (FTC). Since that decision, numerous bills have been introduced in an attempt to grant the FDA this authority.

ANA is opposed to granting the FDA this type of comprehensive authority over tobacco advertising. We strongly responded to the FDA's proposed rules, which we believed were overbroad and unconstitutional. In furtherance of that belief we were joined by a wide array of constitutional scholars from across the political spectrum, from Judge Robert Bork to Professor Laurence Tribe of Harvard Law School. We believe that the FTC already has sufficient authority to prevent any false and misleading ads in this area.

Congressional Activity

Senator Mike DeWine (R-OH) and Representative Tom Davis (R-VA/11) had identical bills pending in Congress to grant the FDA authority over the manufacture, marketing, and sale of tobacco products. Their bill, the Family Smoking Prevention and Tobacco Control Act (S. 666/H.R. 1376), would have codified many of the FDA's 1996 proposed regulations. It would have also allowed states to place their own rules on the time, place, and manner of advertising.

Senator Tom Harkin's (D-IA) Healthy Lifestyles and Prevention America Act (or the HeLP America Act, S. 1074) also remained pending. This bill would have limited the ability of tobacco companies to deduct expenses for tobacco advertising.

Judicial Activity

A major decision was finally reached by the *United States District Court for the District of Columbia in United States v. Philip Morris USA, Inc.*, instituted by the Justice Department in 1999 and continued under the current administration. District Court Judge Gladys Kessler held that tobacco companies had engaged in a long-running campaign of deception regarding "light" and "low tar" cigarettes and ordered tobacco companies to stop using these descriptors. One of the remedies imposed by the court requires the companies to carry out extensive corrective advertising on network television

to overcome any false impressions that might have been created. In October, the implementation of the remedies was stayed until the company could appeal the case.

Another suit remains pending in the California state court system. That suit, *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. ANA, along with the American Association of Advertising Agencies and the American Advertising Federation, filed a "friend-of-the court" brief with the court. The brief pointed out 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.

An additional suit from California was denied review by the United States Supreme Court in March. In *Boeken v. Philip Morris USA, Inc.*, the California Court of Appeal for the Second District upheld a verdict finding Philip Morris had encouraged people to smoke through its advertising. The verdict was appealed by Philip Morris to the California Supreme Court. ANA, the AAAA's and AAF also filed an *amicus* brief. The California Supreme Court declined to hear the case. An appeal was made to the United States Supreme Court, which denied cert in March 2006.

For more information on these cases, please see the "Key Court Cases" section beginning on page 39.

Outlook for 2007

As tobacco advertising remains a highly contentious issue area, we expect that Congressional attempts to grant authority to FDA over this advertising category will persist. Several Democrats slated to be Chairmen of committees in the new Congress, including Senator Ted Kennedy (D-MA) and Representative Henry Waxman (D-CA) have taken strong positions calling for increased regulation of tobacco advertising and are likely to continue to pursue these issues. Also, we will continue to watch the courts, as we expect to see a number of cases make their way through the federal and state court systems. If necessary, we will file friend-of-the-court briefs in defense of the rights of advertisers to promote legal products.

Word of Mouth Marketing

Background

Word of mouth marketing (also called “buzz marketing” is a relatively recent phenomenon. It involves consumers providing information about a company’s products to other consumers at the behest of the company. In 2005, Commercial Alert sent a letter to the Federal Trade Commission requesting it to investigate the practice, calling it a deceptive act and practice under Section 5 of the FTC Act, and asking for new disclosure guidelines.

ANA’s General Counsel, Doug Wood, wrote a letter to the FTC in response on our behalf. Our letter argued that since word of mouth marketing is not per se deceptive, and that the FTC already had adequate regulation in place, there was no need for a large scale investigation of the type Commercial Alert requested. The FTC declined to take formal action, and said it would continue to evaluate alleged fraud and deception in word of mouth marketing on a case by case basis. More information can be viewed at our website, at http://www.ana.net/news/2006/12_11_06.cfm.

In addition, the Word of Mouth Marketing Association (WOMMA, <http://www.womma.org/>) has issued an “Ethics Code” for word of mouth marketers to follow.

Repairing Billboards in Hurricane Ravaged States

Background

The property destruction caused during the 2005 hurricane season also damaged numerous outdoor billboards. Many ANA members use billboard advertising as a tool for communicating with consumers. Rebuilding these destroyed billboards would be a positive boost to the economy of the storm-ravaged areas. However, many billboard owners have experienced resistance from federal regulators to repairing or rebuilding these outdoor boards.

Congressional Activity

In May, the Senate adopted an amendment sponsored by Senator Bob Bennett (R-UT) as part of the supplemental appropriations act (H.R. 4939) that was meant to facilitate rebuilding of damaged billboards. It did not permit the construction of any new billboards; rather it would have merely clarified long standing rules that states decide the process for how rebuilding is conducted for billboards that no longer conform to state laws. It made no changes in federal law and would sunset after three years. There was no similar provision in the House version.

ANA wrote letters to members of the Transportation Subcommittee of the House Appropriations Committee signaling our support of the Senate amendment. In our letters we stressed that without the amendment, companies would struggle further to recover because of the loss of a valuable way to reach consumers. We also asked that our members write letters as well. Several did so providing excellent examples of the value of this type of advertising. After the House passed a bill without an amendment, we urged the House conferees to the conference committee to consider the amendment.

Unfortunately, the amendment was left out of the conference agreement reached by the House and Senate. However, it has been added as an amendment to the Senate's version of the Energy and Water Appropriations bill. The House version does not contain the amendment, but the Chairman of the House Energy and Water Subcommittee, Representative Dave Hobson (R-OH) indicated support for it. The Energy and Water Appropriations bill was not passed before Congress adjourned for the year. We will continue to pursue this issue in conjunction with the Outdoor Advertising Association of America (OAAA).

International Developments

Background

ANA regularly becomes involved in the consideration of international advertising issues through our membership in the World Federation of Advertisers (WFA). The WFA brings together 50 national advertising Associations and 30 international advertisers and works to foster an environment where advertisers around the world can responsibly promote their products. It supports and endorses self-regulatory systems and global best practices for advertising.

Codex Committee on Food Labeling

In April, ANA submitted comments to the U.S. delegation to the Codex Committee on Food Labeling. We urged the Codex delegation not to support the inclusion of a definition of advertising within the Committee's Draft Guidelines for Use of Nutrition and Health Claims. The Codex Alimentarius Commission was created in 1963 by the World Health Organization (WHO) and the Food and Agriculture Organization of the United Nations (FAO) to develop food standards, guidelines and codes of practice. For several years, the Committee on Food Labeling has been working on draft guidelines regarding the use of health claims on food product labels. The Canadian government proposed that the guidelines be extended to include advertising.

Our statement put forth our view that these issues are best left up to individual nations to develop based on their social, cultural, and educational standards. Our comments can be viewed at <http://www.ana.net/news/2006/LettertoUSdelegationonCCFL.pdf>. At the Codex meeting in May, it was decided that further comments from member states would be solicited. Comments are due in December and will be discussed at the next committee meeting in May 2007.

Children's Advertising in Britain

Britain's television regulator, the Office of Communication (Ofcom), considered revisions to its advertising guidelines throughout the year. In March, it released a variety of proposals that it stated were under consideration. Among these proposals were 1) a ban on high-fat, high-sugar or high-salt product (HFSS) advertising in programs made specifically for preschool children or in programs of "particular appeal" to children 9 and under; 2) a total ban on food or drink advertising in these same programs; or 3) limits on the amount of time available for advertising on children's programming. Ofcom rejected the idea of leaving the issue to self-regulation, but also rejected banning food ads before 9pm.

In November, Ofcom adopted a proposal to ban all HFSS product advertising to children under 16. This extremely serious proposal includes not just programming directed at

children, but also youth-oriented and adult programming that is of particular attraction to a large number of viewers under 16.

WHO Developments

The WHO's European Chapter has proposed the development of an international code for food marketing, including the adoption of regulations by member states to reduce the marketing of "energy dense" foods and beverages to children. The WHO's four proposed options are all very restrictive. The four proposals in increasing order of restrictiveness are:

- Specified restrictions on the age groups targeted and the times, settings, and techniques used by advertisers in the commercial promotion of energy-dense, micronutrient-poor foods and drinks;
- No promotion of any energy-dense, micronutrient-poor foods or beverages to children;
- No commercial promotion of any foods or beverages to children; and
- No commercial promotion of any products to children.

Outlook for 2007

ANA continues to monitor attempts in other countries to limit or ban advertising. These attempts, if successful, may inspire similar efforts in this country. We will work actively with the WFA and our member companies to ensure the continued protection of the rights of advertisers worldwide.

Key Court Cases

Background

Every year, there are cases instituted and decided at every level of the state and federal court systems that affect advertising. ANA often participates in these cases, either as a party or through a “friend-of-the court” amicus brief. We filed two briefs in 2006, one in federal court in Utah and another with an appeals court in California. ANA believes it is important to intervene in such cases, as this is how we ensure the courts hear key arguments about the commercial free speech rights of advertisers. Our involvement in past cases has significantly strengthened the First Amendment protection extended to advertising over the past thirty years.

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

Below are the cases the Washington office followed in 2006:

Utah Children’s Registry

Free Speech Coalition v. Shurtleff

In 2004, Utah enacted a law establishing a registry on which parents can register their children’s e-mail addresses. Marketers of “adult-oriented” products are prohibited from sending emails to those addresses. Stiff civil and criminal penalties result from failure to comply with the Act. This suit was brought in federal court by the Free Speech Coalition seeking an injunction against enforcement of the Act. ANA has filed a “friend-of-the-court” brief along with the American Advertising Federation, the American Association of Advertising Agencies, the Email Sender and Provider Coalition, the Electronic Frontier Foundation, and the Center for Democracy and Technology arguing that the Utah registry law 1) is preempted by the federal CAN-SPAM Act, 2) is an impermissible state burden on interstate commerce and violates the Commerce Clause of the U.S. Constitution, 3) is inherently vague and violates the Due Process Clause of the U.S. Constitution, and 4) violates the First Amendment of the U.S. Constitution.

The FTC has carefully studied centralized registry systems such as the Utah regime and concluded that they actually increase the privacy and security risks for children whose e-mail addresses are on the registry. Additionally, it is unlikely that criminal spammers would comply with the Act. Instead, it will impose significant burdens and financial costs on legitimate email marketers and legitimate businesses from around the country who advertise otherwise lawful products and services to adults in Utah and to persons in other states. The Utah law also fails to answer questions such as whether it applies only to products and services that can never be lawfully purchased by a minor, such as alcohol or tobacco products, or if it also applies to products such as cars or credit cards. These latter products cannot be purchased by minors without the consent of a parent.

Our brief can be viewed at <http://www2dev.ana.net/govrel/getfile/29>.

False Advertising Class Action

Pfizer Inc. v. Superior Court of the State of California, Los Angeles County

Steve Galfano filed this class action lawsuit in Los Angeles County Superior Court alleging that Pfizer had made false claims in its ads for Listerine. He included in his class “all persons who purchased Listerine from June 2004 to January 7, 2005.” The trial court certified the class, but the Court of Appeal reversed the decision in July, holding that to have standing, each member of the class had to suffer an injury and not just the lead plaintiff. This was one of the first cases brought since California voters approved Proposition 64 in 2004, which created more stringent standards for private citizens to sue on behalf of the public at large under the Unfair Competition Law (UCL) of the state Business and Professions Code.

ANA, along with the U.S. Chamber of Commerce and the Coalition for Healthcare Communication, successfully filed a “friend-of-the-court” brief with the Court of Appeal. The industry brief stated: “The UCL, as construed by the trial court, allows an action to be maintained on behalf of class members who – for lack of injury, loss, or proximate causation – could not otherwise maintain an individual action in their own name. So construed, the UCL violates the First Amendment and the California Constitution by upsetting the balance between the competing interests of free speech and the regulation of false and misleading speech, and thereby chilling the speech of California advertisers. Furthermore, because California advertisers are typically national advertisers, the trial court’s constitutionally infirm construction of the UCL also places an unconstitutional burden on interstate commerce.”

Our brief can be viewed at http://www.ana.net/news/2006/Galfano_Amici_Brief.pdf. The case has been appealed to the California Supreme Court, with further action deferred pending the disposition of a related issue regarding Proposition 64 in *In re Tobacco Cases II* (see below).

Food Advertising

Hoyte v. Yum! Brands, Inc. d/b/a/ KFC

The Center for Science in the Public Interest (CSPI) filed this suit in the District of Columbia Superior Court alleging a campaign of deception by KFC regarding its use of partially hydrogenated oil containing trans fats. This suit alleges KFC deceived consumers by hiding its use of the oil, and violated its duty of care by doing so. It singled out claims made by KFC in ads and on its website representing its food as part of a healthy lifestyle. The suit sought to enjoin KFC from using trans fats. CSPI intimated that similar suits were likely against other family and quick-service restaurants for the

use of trans fats. CSPI withdrew the lawsuit after KFC announced it would switch to a trans fat-free cooking oil at all of its 5,500 domestic restaurants.

CSPI also threatened, in a widely attended press conference in Washington, D.C., to file a lawsuit in Massachusetts against Kellogg and Viacom alleging they engaged in false, deceptive and unfair acts or practices by marketing “junk foods” to children under eight. The suit was to be filed under a Massachusetts law which carried a minimum penalty of \$25 for each violation. A violation would occur, CSPI alleged, each time an advertisement was aired or placed on packaging, creating the potential for damages in the billions of dollars. CSPI also planned to ask the court to enjoin the companies from marketing during programs where more than 15% of the audience was under eight. If the suit was successful, it would create a precedent for damages for any other alleged “false, deceptive and unfair” ad, depending on who was viewing it. The suit has yet to be filed.

Tobacco Advertising

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 American Association of Advertising Agencies and the American Advertising Federation, 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 just because they made the products appear appealing. This would create a dangerous precedent for a number of other categories of advertising. This case is still pending in the California Supreme Court.

Boeken v. Philip Morris USA, Inc.

In this case, the California Court of Appeal for the Second District upheld a trial court verdict finding 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, finding fraudulent misrepresentation. ANA, along with the American Advertising Federation and the American Association of Advertising Agencies filed a “friend-of-the court” brief with the California Supreme Court in favor of Philip Morris’ petition for review. The petition was denied in September 2005. The United States Supreme Court denied cert in March 2006.

Coalitions

ANA remains an active member of The Advertising Coalition; the Alliance for American Advertising; 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. In 2004, the Coalition sponsored the Global Insight study, which demonstrated the enormous impact of the advertising industry on the national economy. 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 2006, The Advertising Coalition worked to educate Members of Congress and their staffs on the benefits of prescription drug advertising. It also helped in our fight against a potential backdoor tax on advertising in Texas.

The Alliance for American Advertising

Leaders in the advertising and media industries have created The Alliance for American Advertising (AAA) to demonstrate to policymakers and to the general public the commitment of the advertising industry to responsible advertising. The Coalition consists of major national advertisers, manufacturers, and advertising and media professionals 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. Other members include the Snack Food Association, the National Restaurant Association (NRA), the Magazine Publishers of America (MPA), the Point of Purchasing Advertising International (POPAI), the National Cable & Telecommunications Association (NCTA), the National Association of Broadcasters (NAB), General Mills, Inc., Kellogg Company, Kraft Foods, Inc., and PepsiCo, Inc.

The AAA was instrumental in formulating an industry response to the Federal Trade Commission/Department of Health and Human Services obesity workshop and helped to develop research into the attitude of parents towards advertising and its effects on obesity. It also conducted meetings with federal policymakers and worked to have the CAMRA Act (S. 1902) amended in committee (see page 16 for more information).

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); the National Retail Federation (NRF); and the Point of Purchasing Advertising International (POPAI). FAC was very involved in general privacy issues and the child protection registry debate in Michigan and Utah in 2006.

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. Our activities on the state level in 2006 are detailed on page 8.

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>.