2015 Compendium of Legislative, Regulatory, and Legal Issues Affecting Advertising

Report from ANA's Washington, D.C. Office

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Introduction

ANA's Washington office serves as a leader in presenting advertisers' views on key advertising and marketing issues to policymakers at both the federal and state levels, the regulatory agencies, and the judiciary. Our community faced a number of major challenges in 2015. The following is a brief summary of some of the most important issues the Washington office confronted this year.

The Ad Tax Threat: For the first time in history, draft bills in both the Senate and the House proposed to seriously restrict the current tax deduction for advertising costs. These proposals allow marketers to deduct only 50 percent of their ad spending in the first year and to amortize the remaining 50 percent over ten years in the House bill and five years in the Senate bill. Presently, advertisers are allowed to deduct virtually 100 percent of their expenditures in the year in which they are made. Congress was not able to consider this issue as part of tax reform this year, particularly in light of the highly contentious political environment on Capitol Hill. The leadership shuffle resulting from Speaker of the House John Boehner's sudden resignation caused even further political distraction and turmoil. Nevertheless, pressure for Congress to act is ramping up through calls to couple international tax reform with long-term infrastructure funding. Working through The Advertising Coalition (TAC), ANA and others in the ad community have responded aggressively to these potential ad tax threats, including updating the IHS Economics & Country Risk study. The study quantifies the economic impact of advertising in every state and congressional district in the country and demonstrates that advertising is one of the main drivers of jobs and economic activity in the U.S. TAC has also provided extensive briefings to Congressional staff and held numerous grassroots meetings with key members of Congress. Furthermore, tax reform is a hot topic on the campaign trail, with several potential presidential candidates publishing widely divergent tax reform plans. A recent attack against the tax deductibility of direct-to-consumer pharmaceutical advertising shows that ad tax issues are of increasing importance and that advertisers must continue to be on high alert in the months and years ahead.

Privacy, Online Behavioral Advertising (OBA), and Data Security: As the 24/7 international online marketplace has radically changed the face of advertising, our industry is now focused on a broad range of privacy and data security issues. The explosive growth of new communication technologies makes it increasingly hard for legislators and regulators to keep pace. In response, we have substantially expanded the efforts of the Digital Advertising Alliance (DAA), our industry's interest based advertising self-regulatory program. The lack of Congressional action on data breach legislation has left room for individual states to step in and create a patchwork of 47 inconsistent state laws. ANA and other industry groups continue to fight for a comprehensive national approach to this critical issue. In 2015, ANA also helped defeat an onerous data breach bill in Illinois that for the first time targeted marketing and geolocation data.

Food Advertising: We continue to work to preserve the major victory our industry won in 2011 when we blocked a proposal from an Interagency Working Group (IWG) of four powerful federal agencies (the FTC, FDA, CDC, and USDA) that would have seriously restricted the marketing and advertising of a wide array of food, beverage, and restaurant products. Pressure, however, is

increasing internationally and within certain U.S. localities to attempt to restrict some categories of food advertising motivated by efforts to combat obesity.

Online Piracy: ANA's Legal Affairs Committee worked with the 4A's in 2012 to develop a Statement of Best Practices addressing online piracy. That statement encourages all marketers to take affirmative steps to address the serious problems of online piracy and counterfeiting. In February 2015, ANA, the 4A's and the IAB launched the Trustworthy Accountability Group (TAG). TAG works to eliminate fraudulent digital advertising traffic, combat malware, fight ad-supported Internet piracy to promote brand integrity, and promote brand safety through greater transparency. Congress has shown continued interest in self-regulatory efforts to address these challenges, and TAG's anti-piracy group met with White House staff to bring the administration up to date on progress made and to determine if there were areas where White House support would be productive. TAG also recently launched a major new anti-piracy self-regulatory program with the support of ANA, numerous major advertisers, and other key elements of the ad community.

ICANN and New Top-Level Domains (TLDs): ANA took a primary leadership role for almost two years in focusing a spotlight on the serious unresolved problems with ICANN's plan for a virtually unlimited expansion of generic TLDs. While we were not successful in getting a delay in the application process, we greatly increased the focus of both policymakers and the business community on the practices of ICANN and the serious problems with their new TLD program. We continue to monitor this area and alert our members to the importance of protecting their brands through ICANN's Trademark Clearinghouse. We continue to reach out to ICANN and are actively watching as the Department of Commerce considers the steps necessary to be undertaken by ICANN before transferring its key domain name functions to the global multi-stakeholder community.

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All of these issues, along with a host of others, are discussed in detail in this Compendium. As always, we post regular updates on these and any other important advertising issues we are currently working on at http://www.ana.net/advocacy. The site contains a comprehensive tracking system of legislative, regulatory, and legal issues facing our industry and further analysis is contained in Dan Jaffe's Regulatory Rumblings blog as well. **We also have a Twitter account, @ANAGovRel, which you can follow for breaking legislative and regulatory news.** If you have any questions, the DC office can be reached at 202-296-1883. Individual staff members can be reached as follows:

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Federal Advertising Tax Deductibility

Background

Advertising is fully deductible as a business expense – and has been since the inception of the tax code over a century ago. This status, however, has been threatened repeatedly. Until the most recent attack, the last large scale across-the-board threat occurred in 1990, when it appeared that a limitation of the advertising deduction would be part of the bill that raised taxes despite President George H.W. Bush's "read my lips: no new taxes" pledge. Due to the efforts of ANA and others in the ad community, the final bill did not change the tax treatment of advertising.

Over the past two years, however, the tax deduction for advertising has come under significant challenge. Leaders of both parties would like to undertake large-scale reform of the tax code. This sweeping overhaul would be the first comprehensive change since President Ronald Reagan and Democrats in the House and Senate pushed forward the bipartisan Tax Reform Act of 1986. While there is impetus for reform of the individual code, most of the effort has been geared towards corporate tax reform.

The United States has one of the highest statutory corporate tax rates in the industrialized world, and thus is at a competitive disadvantage compared to our North American, European, and Asian counterparts. Consequently, the number of U.S. companies seeking to reincorporate abroad to gain tax advantages through the purchase of a foreign company (known as a "tax inversion") has grown substantially over the last two years.

As part of tax reform proposals introduced in late 2013 and early 2014, the advertising tax deduction was threatened with fundamental change. A draft Senate bill would have allowed the immediate deduction of 50% of advertising expenses and required the remaining 50% to be amortized over a five year period. Meanwhile, a similar proposal in the House of Representatives would have required 50% of expenses to be amortized over a 10 year period. ANA and our partners in The Advertising Coalition (TAC) mobilized to strongly oppose these amortization proposals.

Congressional Activity

The ad deduction remains under significant threat. Despite the retirements of both Senate Finance Committee Chairman Max Baucus (D-MT) and House Ways and Means Committee Chairman Dave Camp (R-MI), the authors of the draft tax reform bills, others have picked up the mantle. President Obama, then Speaker of the House John Boehner (R-OH), Senate Majority Leader Mitch McConnell (R-KY), and Senate Minority Leader Harry Reid (D-NV) all indicated that tax reform could be an area for bipartisan compromise.

In January, new Senate Finance Committee Chairman Orrin Hatch (R-UT) and Ranking Democratic Member Ron Wyden (D-OR) announced the formation of five working groups to examine various segments of the tax code. Each working group was directed to receive comments from interested parties by April 15 (a date picked for obvious reasons) and to come up with recommendations for tax reform legislation.

The Business Income Tax Working Group, headed by Senators John Thune (R-SD) and Benjamin Cardin (D-MD) was tasked to consider the corporate tax code. The Finance Committee also held a series of hearings in the early months of 2015 on the simplification of the tax code. The working groups were scheduled to come up with their recommendations by Memorial Day, but that deadline was later further extended until July.

ANA filed comments with the working group on April 15. While generally supportive of tax reform, our comments noted our strong opposition to the amortization proposals in the Baucus and Camp drafts as a radical departure from over 100 years of corporate tax policy that allowed for immediate deductibility of advertising expenditures in the year in which they are made. Our comments described the immense benefits provided to the U.S. economy by advertising and that any change in the deduction would be extremely counterproductive and bad tax policy. Our comments can be viewed at http://www.ana.net/getfile/22308.

The Business Income Tax Working Group released its recommendations on July 8. The report did not explicitly single out advertising amortization. However, a list of potential major revenue raising proposals to fund tax reform listed the amortization of advertising expenses as generating $169 billion in tax revenues over 10 years, placing it third highest on the list. Only depreciation changes ($269.5 billion) and amortization of research and experimentation expenditures ($192.6 billion), whose immediate deductibility was recently made permanent as part of the tax extender package, were claimed to raise higher levels of revenue. The working group's report can be viewed at http://www.finance.senate.gov/download/?id=B4AEDDC8-9E94-4380-9AF4-9388953FB347.

In the House of Representatives, new Ways & Means Committee Chairman Paul Ryan (R-WI) signaled his support for tax reform, and had even stated in April that "tax reform is a 2015 thing for sure" but that if it "goes past summer, it's hard to see."

In February, we sent a letter to the 99 new members of Congress discussing the importance of the advertising tax deduction. We also sent letters to the Nevada Congressional delegation to mark the start of the annual Consumer Electronics Show in Las Vegas urging opposition to the amortization proposals. This letter followed efforts in 2014 to highlight the importance of advertising to the New York and Illinois Congressional delegations.

In June, two members of the House of Representatives, Kevin Yoder (R-KS) and Eliot Engel (D-NY) circulated a "Dear Colleague" letter to colleagues addressed to Speaker Boehner and House Minority Leader Nancy Pelosi (D-CA) opposing proposals to amortize advertising deductions. Through the efforts of ANA and The Advertising Coalition, 88 members of the House signed on in support of the letter. ANA staff specifically made calls and sent emails to over 30 offices and also sent a letter to the House Energy and Commerce Committee urging members to sign. The Engel-Yoder letter can be viewed at http://www.ana.net/getfile/22532.

New IHS Study on the Economic Impact of Advertising

The Advertising Coalition, of which ANA is a founding member, conducted a major update of important research on the value of advertising to the economy in 2015. This study, undertaken by the widely respected research firm IHS Economics & Country Risk and based on a model developed by Dr. Lawrence R. Klein, the winner of the 1980 Nobel Memorial Prize in Economic Studies, is a critical tool in our lobbying efforts against changing the tax treatment of advertising.

For the first time, we also had IHS look into the impact of advertising on gross domestic product (GDP). The updated report with major funding support from ANA, showed that:

- Advertising supported $5.8 trillion or 18% of U.S. output and 20 million or 14% of U.S. jobs in 2014
- Every dollar of ad spending supported, on average, $19 in economic output (sales)
- Every million dollars spent on advertising supported 67 American jobs
- The total impact of advertising represented 19% of U.S. GDP

The study, released in November, breaks down these figures to cover all 50 states and all 435 Congressional districts in the United States. It is a critical part of our efforts in encouraging members to preserve the full tax deductibility of advertising. It is used in our contacts both on Capitol Hill and in the grassroots meetings TAC holds with members of Congress at the state level, 15 of which took place in 2015.

Category Specific Advertising Tax Proposals

Every year, there are proposals to end the tax deduction for advertising of various product categories. Recent proposals have involved the tax deduction for the advertising of alcohol beverages, tobacco products, and direct-to-consumer prescription drug advertising.

In September, Democratic presidential nominee Hillary Clinton proposed "cracking down on direct-to-consumer advertising" in a campaign speech in Iowa. Alleging that these ads are confusing and misleading, she said she would eliminate the tax deduction for prescription drug advertising, require companies to reinvest a certain amount in research, and establish required FDA pre-clearance for drug ads.

ANA's Dan Jaffe responded to Secretary Clinton's proposal with a blog that can be viewed at http://www.ana.net/blogs/show/id/36743, which lays out the enormous value of DTC prescription drug ads to the public, providing them critical information on life-saving and life-enhancing therapies. The proposal is very likely to be unconstitutional.

Outlook for 2016

The advertising industry is by no means out of the woods. Congress was not able to finalize tax reform in 2015, and with 2016 being an election year, it may not be able to complete the tax reform process this year either, but it is highly likely with the tax reform issue such a high profile political agenda item, that the efforts will continue to move this process forward. The Senate working group draft put a large dollar sign target on the advertising industry. Now, whenever a major new funding source is needed for a spending priority, the ad deduction could be on the table.

In addition, with the ascension of former House Ways & Means Committee Chairman Paul Ryan (R-WI) to the Speaker's chair, the top Republican in the House of Representatives is a major backer of comprehensive tax reform. This is in sharp contrast to former Speaker John Boehner (R-OH), who was quite bluntly dismissive of the draft bill put out by former Ways & Means Chairman Dave Camp (R-MI). We will stay on alert in regard to this critical issue, where the proposed changes to the advertising tax deduction have been estimated to impose, as noted, a $169 billion in additional costs on the ad community.

State Advertising Tax Deductibility

Background

Forty-nine of the 50 states are constitutionally required to balance their budgets every year. Nearly all states exempt advertising from state sales or gross receipts taxes. When searching for new revenue or looking to broaden the tax base to lower tax rates, however, states often examine ending the tax exemption for advertising.

Over the last 25 years, ANA has helped defeat over 120 ad tax proposals in more than 40 states. These successful efforts have saved the ad community potentially billions of dollars in additional tax burdens. We work with our member companies and our sister associations, the American Association of Advertising Agencies (4A's) and the American Advertising Federation (AAF), to respond to these threats. Through The Advertising Coalition (TAC), we have produced the IHS Economics and Country Risk study, which demonstrates the benefits of advertising to the national economy and to each of the fifty states and every congressional district. We also work closely with the broadcasters, newspaper publishers, magazine publishers and outdoor advertising groups in the states to explain why taxing advertising is a bad idea.

2015 Proposals

The marketing community has faced potential state ad tax threats in five states this year. There are two states that still have not yet finalized their budgets.

California
State Senator Bob Hertzberg introduced a bill in January that calls for a sweeping overhaul of the California state and local tax structure. Senate Bill 8 would extend the sales tax to cover a broad range of services including advertising. The bill has not moved at all this year, but Senator Hertzberg has indicated that he may seek to turn his proposal into a ballot initiative to go before the voters next year or in 2017. He is an influential member of the state legislature; he served as Speaker of the Assembly from 1996 to 2002 before being elected to the Senate.

We are working closely with the California broadcasters and other industry groups to follow this proposal very carefully. Fighting a ballot initiative particularly in California obviously can be very expensive.

Illinois
Governor Bruce Rauner and the Illinois General Assembly remain locked in a heated political battle over the state's budget for the current fiscal year, which began on July 1. During his successful election campaign last year, Rauner had proposed extending the sales tax to a number of services, including advertising on billboards, radio and television, as well as ad agency services.

The Governor has not specifically called for a new tax on services this year as part of the budget debate. ANA, however, has been working closely with the state broadcasters and a coalition of other industry groups in Illinois for several months to prepare for a possible ad tax fight. We helped provide funding for the coalition, which has a website at: http://noadtaxillinois.com.

Governor Rauner is a Republican who has called for reforms in state government and the Democrats control both houses of the General Assembly. Despite the current deadlock, some budget deal will ultimately have to be reached as the legislature is required under the state constitution to balance the budget, so we continue to closely monitor developments in Springfield.

Maine
Governor Paul LePage introduced a budget proposal in January that called for major changes in the state's tax system, including raising the sales tax rate and expanding the base to cover advertising, public relations and a number of other "professional services." We worked closely with the Maine Association of Broadcasters to oppose this change. The final budget adopted in June did not include any expansion of the sales tax base.

North Carolina
An ad tax threat emerged in June at the end of the budget process in the North Carolina General Assembly. The leadership in the Senate developed a budget bill that would extend the 4.75% sales tax to advertising and several other services. The new service taxes would help pay for cuts in the personal income tax rates. There was no similar provision in the House version of the budget bill. Republicans control both houses of the assembly.

We worked closely with the state broadcasters and other industry groups as conferees were appointed to resolve the differences between the two versions of the budget. We learned that the inclusion of the ad tax in the Senate bill may have been influenced by several critical editorials about the legislature from media companies in the state.

After months of delays and negotiations, the Senate and House finally agreed on a final budget in mid-September that did not include any tax on advertising.

Pennsylvania
First-year Democratic Governor Thomas Wolf introduced a budget proposal this spring that would increase the sales tax rate to 6.6% and expand the base to cover a broad range of services including advertising. Republicans control both houses of the General Assembly and they passed a budget on June 30 that did not include the major tax changes proposed by the governor. That budget was vetoed by Governor Wolf. Negotiations between the governor and leaders in the legislature have continued off and on since the beginning of the fiscal year on July 1. We are working closely with the state broadcasters and other industry groups to monitor developments in Harrisburg.

Outlook for 2016

These state ad tax threats come up almost every year – and as we learned again in 2015, both Republican and Democratic leaders are open to considering taxing advertising. With our recent update to the IHS study, we now have additional data that shows the harm taxing advertising would impose on every state in the nation. We will continue to work hard with our allies and friends when confronted with state advertising tax proposals.

Privacy and Online Behavioral Advertising

Background

The Internet provides consumers with a vast amount of free services and content primarily funded by advertising. Online Behavioral Advertising (OBA), also known as interest-based advertising, involves the anonymous tracking of users' web browsing history in order to serve consumers ads tailored to their interests. This type of tailored advertising is generally carried out through the use of a cookie, which is a small text file stored in the cache of a web browser.

Interest based advertising has enormous benefits for both consumers and advertisers. Consumers are more likely to see advertisements of interest to them. Advertisers also can more effectively and efficiently reach potential customers. This practice, however, has been the source of increasing expressions of privacy concerns by some members of Congress, federal regulators, and consumer groups.

In 2009, the FTC called on industry to provide transparency concerning OBA practices and to give consumers meaningful opt-out choices. In conjunction with a number of other associations, ANA released Principles for Online Behavioral Advertising (http://www.ana.net/advocacy/getfile/15279). In October 2010, a Self-Regulatory Program for Online Behavioral Advertising was launched by ANA and its industry partners (the DMA, IAB, NAI, 4As, and AAF). This new self-regulatory program was named the Digital Advertising Alliance (DAA). This type of program is now operational in over 32 countries including the EU and Canada. Despite significant self-regulatory progress, there remain calls for stricter privacy regulations from the Congress, federal regulatory agencies, state governments, and governments of other countries.

Digital Advertising Alliance Self-Regulatory Program

The Program
Building on the release of the Digital Advertising Alliance Self-Regulatory Principles, the DAA launched a Self-Regulatory Program in October 2010 (http://www.aboutads.info).

Advertisements from participating companies display an icon that informs viewers they are seeing an ad served to them based on interest based advertising (http://www.ana.net/content/show/id/advocacy-obatoolkit). If viewers click on the icon, they are taken to the DAA's website where they are able to access information about OBA and opt-out of further behavioral advertising from any or all companies participating in the DAA program. Enforcement of the program is administered by the Council of Better Business Bureaus (CBBB) and DMA. In its short time in existence, the DAA's icon has been placed multi-trillions of times, and a large number of advertisers are now participating members. There have been over 50 million visits to the DAA website with over 7 million opting out of receiving interest based ads. A strong and robust self-regulatory program remains the best hope for preventing overly restrictive legislation in this area.

Mobile Guidelines
On September 1, 2015, DAA began enforcing its new set of guidelines for companies which collect and use data across mobile sites or mobile apps for interest-based advertising purposes (http://www.aboutads.info/DAA_Mobile_Guidance.pdf). These new guidelines were written to help advertisers "provide consumers the ability to see and exercise control over the use of cross-app,

personal directory, and precise location data in mobile apps." Because so many advertisers, including ANA members, conduct substantial and increasing business in the mobile environment, this expansion is crucially important to ensuring consumers that their privacy choices will be respected. It also helps to demonstrate to Congress and the FTC that the industry is serious about protecting consumer choice. In November, DAA launched "AppChoices en Español," an updated version of its mobile app that provides access to the DAA's transparency and choice mechanisms for Spanish speakers in the U.S. AppChoices is the first cross-industry self-regulatory tool to address the twin issues of transparency and consumer control in mobile apps.

Cross-Device Advertising Guidelines
On November 16, DAA released guidance to help companies apply the its Self-Regulatory Principles in the rapidly growing cross-device environment (http://www.aboutads.info/sites/default/files/DAA_Cross-Device_Guidance-Final.pdf). The guidance makes clear that the transparency and choice obligations in the existing Principles apply to cross-device data practices, which are also subject to the DAA's independent enforcement. The goal of this new guidance is to help participants in the digital advertising ecosystem better understand their obligations regarding cross-device data and to ensure that a consistent self-regulatory framework is applied to the collection and use of such data across the multiple computers and mobile devices used by consumers.

Enforcement
Enforcement of the DAA's Self-Regulatory Principles is administered by the Advertising Self-Regulatory Council (ASRC)'s Accountability Program, a part of the Council of Better Business Bureaus (CBBB). The Accountability Program and its sister accountability group, the Direct Marketing Association, help companies come into compliance and handle complaints regarding non-compliance. Since its creation in 2011, the Accountability Program has issued 60 public actions taken against companies that violate the Self-Regulatory Principles, and the Program has only had to refer one company to a regulatory agency for refusal to participate in its self-regulatory compliance process. To learn more about the ASRC, visit: www.advertisingselfregulation.org.

Congressional Activity

Privacy issues have been extremely active areas in the Congress in recent years. This year, several bills were introduced, but none came to a floor vote.

Student Privacy
On June 11, Senator Ed Markey (D-MA) introduced the Do Not Track Kids Act of 2015, a bill which would extend the Children's Online Privacy Protection Act of 1998 (COPPA) to certain online applications and mobile applications directed to children (https://www.congress.gov/bill/114th-congress/senate-bill/1563). It prohibits targeted marketing to children (defined as persons under 13) without verifiable parental consent and to minors, defined as persons over 12 but under 16, without the minor's consent and prohibits the collection of geolocation information from children or minors. It creates a safe harbor if a company has adopted a Digital Marketing Bill of Rights for Teens that is consistent with fair information practices principles. The bill also establishes provisions for the creation of an "eraser" button that would allow users to eliminate content that is publically available and contains or displays personal information of children or minors. Currently Senators Kirk (R-IL),

Blumenthal (D-CT), and Menendez (D-NJ) are cosponsors of the bill. A companion bill, H.R. 2734, has been introduced in the House by Rep. Joe Barton (R-TX) and has 14 cosponsors.

Federal Trade Commission

ANA has continued to actively engage, both on its own and through the DAA, with the FTC on privacy issues. While there has been no major legislative action in the Congress on privacy issues this year, the Federal Trade Commission (FTC) has been very active. Over the last several months, the Commission has held a series of workshops or seminars on the following issues: the "Internet of Things;" mobile device tracking; alternative scoring products; and consumer generated and controlled health data. A workshop also was held in November 2015 on cross-device tracking. All of these seminars raised serious concerns about the safety of private information and the way that information is being used in today's advertising landscape.

FTC Commissioner Terrell McSweeny spoke at our 2015 Advertising Law and Public Policy Conference. During her speech, Commissioner McSweeny applauded the work done by the DAA and the advertising industry's commitment to effective self-regulation.

Right to Be Forgotten

The "Right to be Forgotten" is also becoming a growing privacy issue. It has been a little over a year since the European Court of Justice in Luxembourg established the "Right to be Forgotten" online in a groundbreaking and disturbing decision. The ruling mandated Google to take down data that is "inadequate, irrelevant, no longer relevant, or excessive in relation to the purposes for which they were processed and in light of the time that has elapsed." While it was not initially clear how far the Right to Be Forgotten would be attempted to be extended, Google is now under pressure from the French government to apply the ruling worldwide. Google recently rejected a request from the French government to remove links not just from all European search results but also from all versions globally to carry out the Right to Be Forgotten mandate.

In the U.S., the debate has taken the form of a petition to the FTC from Consumer Watchdog demanding that the Right to Be Forgotten be enforced here. They claim that Google's refusal to do so "…while holding itself out to be concerned about users' privacy is both unfair and deceptive, violating Section 5 of the Federal Trade Commission Act."
We believe this view is legally baseless. On July 31, ANA sent a letter to the FTC explaining why the Commission should immediately dismiss Consumer Watchdog's complaint (http://www.ana.net/getfile/22665). The letter explains that allowing Right to Be Forgotten policies to be enforced in the U.S. would cause serious and undue harm to the public's right to determine for itself what is important and relevant information. Furthermore, it would seriously undermine free expression under the First Amendment.

Ad Blocking

Apple recently announced that the next version of its mobile Safari browser, iOS9, which it rolled out in September, would provide its users "ad blocking" capabilities. Safari is estimated to account for up to 25% of mobile web traffic and with the new version of Safari, its users would be able to more easily block mobile web advertising. A day after Apple's new mobile software was released, 3 of the top 4 apps in its App Store were ad blockers. Within the first week, the 10 most popular ad blocking apps were downloaded nearly 600,000 times combined. This move

is part of a rising trend of consumers using ad blocking technology, with some estimates showing a rise in the use of that technology by up to 70% from June 2013 to June 2014. Particularly worrisome is the fact that millennials especially are substantial users of ad blocking technology, so without an adequate response, this is likely to be a growing trend.

In addition to announcing mobile ad blocking, Apple CEO Tim Cook severely attacked the ad funded ecosystem as undermining consumer privacy. The comments were made at an Electronic Privacy Information Center event, where Cook stated, in reference to ad-funded companies such as Google and Facebook, that: "[t]hey're gobbling up everything they can learn from you and trying to monetize it. We think that's wrong. And it's not the kind of company that Apple wants to be." A number of other companies also are increasing the availability of ad blocking technologies.

Taken together, these recent developments are creating increasing threats to the ad-funded economy. Clearly, if there is sufficient ad blocking, the present enormous and generally free access to information funded by advertising is likely to be jeopardized as companies would have to find other ways to monetize their activities. ANA and others in the ad community are actively examining all potential options to respond to this challenge.

EU-US Safe Harbor

The trans-Atlantic "safe harbor" trade agreement which allows companies to share online customer data between Europe and the United States came under fire in September (http://nyti.ms/1OQPWDu). Yves Bot, the Advocate General of the European Court of Justice, ruled that American privacy rules did not offer European citizens enough protection against their online data being misused by companies or national governments and therefore, domestic regulators in each European country should have the right to suspend transfers of data about their citizens to the United States (http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-09/cp150106en.pdf).

Although the European Court of Justice did not have to follow Bot's ruling, on October 6th the Court invalidated the Safe Harbor agreement, stating that "*national security, public interest and law enforcement requirements of the United States prevail over the safe harbour scheme, so that United States undertakings are bound to disregard, without limitation, the protective rules laid down by that scheme where they conflict with such requirements*," and that as a result of this and other factors the Safe Harbor Decision should be deemed invalid (http://www.politico.eu/wp-content/uploads/2015/10/schrems-judgment.pdf). Since the European Court of Justice is the highest legal authority in the European Union, its decision cannot be appealed.

Many technology companies rely on transferring personal data between the two continents to power their operations, particularly to tailor advertisements to individuals and promote products or services based on users' online activities. Efforts to block the movement of such data could not only impose technical complexities on companies, but could also require companies to re-evaluate how they make money and provide online services. Companies may not be able to offer new services to Europeans if such offerings relied on sending online data outside the 28-member bloc. Also, this decision threatens to create incentives for differing privacy regimes in the various EU countries creating further complexity, confusion, and fragmentation in regard to international information transfer.

This ruling comes as the European Commission and the United States are in the midst of long-running discussions over strengthening the Safe Harbor framework. It is likely the Court's ruling will complicate these negotiations and that it will put more pressure on the United States to comply with the heightened standards being requested by the EU. However, it could cause the US negotiators to take a more stringent position as well in order to protect the interests of American companies. It is unclear how long these negotiations will continue or when alternative methods of transferring data will be offered.

EU General Data Protection Regulation

In December, the European Parliament, the European Council, and European Commission reached a new agreement on data protection rules in the EU. These new rules include an expansion of the definition of personal data to include numerous types of data, including email addresses and IP addresses; allowing member states to determine when parental consent is needed online for those 16 years old or younger; requiring explicit consent for the use of data for online marketing purposes; and requiring 72 hours' notice to national authorities in the event of a data breach. The final regulations must be approved by the European Parliament in 2016 and any new regulations are expected to take effect by 2018.

Internet of Things (IOT)

In the growing world of the Internet of Things, where everything from cars to toothbrushes to refrigerators are collecting and sharing information, privacy and data security concerns are greatly increasing. The Internet of Things creates novel challenges as there often are not easily accessible interfaces where consumers can state their privacy preferences. Therefore, the ad community must also develop a strategy to address the expanding universe of privacy and data security issues raised by IOT, addressable TV, and other similar developments.

Outlook for 2016

We expect privacy and interest based advertising to remain hot button issue areas at the federal, state, and international arenas. While Congress may take more time to develop new legislation, the advertising industry will need to continue to be at the forefront of addressing emerging technological privacy challenges including responding to ad blocking initiatives.

Data Security

Background

Data security is an increasingly important issue for advertisers around the globe. On a virtually weekly basis, media reports tell of hackers stealing important consumer information from vulnerable companies and government agencies. These hacking attacks have been the largest in history and the companies impacted include Target, Home Depot, Sony, and Neiman Marcus among numerous others. The attack on Target, for example, affected 40 million credit cards and over 70 million records were stolen. In the Sony hack, it was believed a foreign government instigated the intrusion. In the government sector, hacks have included 22 million highly sensitive or top secret files from the Office of Personnel Management (OPM), to the information of over 800,000 employees of the U.S. Postal Service, to the unclassified White House computer networks.

As the technological landscape continues to change rapidly and radically, it is critical that, where appropriate, legislation be updated to handle current threats while still providing enough flexibility to address issues that arise in the future. Last year, we joined with other members of the Digital Advertising Alliance (DAA) and a number of other business organizations in a letter to the congressional leadership expressing support for federal data security legislation that would preempt the 47 inconsistent, overlapping, and constantly changing state laws now on the books (http://www.ana.net/getfile/21092). ANA and the other groups also stated that breach notification must be based on a material risk to consumers.

Congressional Activity

At least five congressional committees held hearings this year on data breach issues and several data breach/data security bills were introduced.

One particularly noteworthy legislative effort is H.R. 1770, the Data Security and Breach Notification Act (https://www.congress.gov/bill/114th-congress/house-bill/1770). The bill was written by House Energy and Commerce Vice Chairman Marsha Blackburn (R-TN) and Congressman Peter Welch (D-VT), and would require certain entities that collect and maintain personal information to secure that information and provide notice to individuals in the event of a security breach. Representative Blackburn discussed her legislation at a "meet and greet" in ANA's office on February 25. H.R. 1770 was approved by the House Energy and Commerce Committee on April 15 on a party-line vote but unfortunately no final action was taken in the House. Congressman Blackburn has vowed to push this legislation in the next Congress.

ANA took part in numerous meetings with key members of the House Energy and Commerce Committee emphasizing the importance of a strong federal preemption provision. The sponsors and leadership worked hard to build bipartisan support for the legislation, and we were hopeful that the bill would be considered in the fall on the House floor. However, there was strong opposition in some quarters to federal data security laws. Attorneys General from states with data breach laws wrote to Congress opposing federal preemption in this area.

Several data breach bills were introduced in the Senate but its members are waiting for the House to act before marking up these bills. Ultimately, no final action was taken on this issue in

either congressional chamber, but Representative Blackburn promised to continue to push for this legislation in 2016.

State Data Breach Developments

In the absence of federal legislation, states often have attempted to establish their own privacy and data security regimes. ANA believes that a state-by-state approach to this issue puts an extraordinary burden on industry to comply with the 47 varying state data breach laws and regulations. In addition there are separate data breach laws in the District of Columbia, Puerto Rico, the Virgin Islands, and Guam.

ANA continues to oppose worrisome changes in several data breach laws. The most serious proposal was SB 1833 in Illinois (http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1833&GAID=13&DocTypeID=SB&LegID=&SessionID=88&SpecSess=&Session=&GA=99). The bill was drafted by the state attorney general and would have, for the first time in any state, added "consumer marketing information" to the definition of personal information. This dramatic expansion of the scope of the data breach law, particularly without any harm component, could have cost companies multi-millions of dollars and created a very dangerous precedent for other states to consider. The bill also contained geolocation breach notification language.

ANA worked very actively with our members and other industry groups to oppose this bill. Despite considerable effort, the bill was approved by the General Assembly, though on a relatively close vote. On August 21, Illinois Governor Bruce Rauner issued an amendatory line-item veto of the bill by striking out the most egregious provisions, particularly the inclusion of "consumer marketing information" in the legislation. The Governor sent the bill back to the legislature where the General Assembly could have voted to override the veto. However, the legislature adjourned without voting on the bill, leaving it to die and not be enacted. ANA and others in the business community had worked with the Governor's office in regard to these important changes.

In early December, HB 1260, which included the governor's favorable SB 1833 amendatory veto language, was passed by the Illinois House. On top of the veto language from the governor, an amendment to HB 1260 deleted language requiring a data collector that owns or licenses personal information and suffers a single breach of the security of the data concerning the personal information of more than 250 Illinois residents to provide notice to the Attorney General of the breach. This bill is now awaiting concurrence in the Senate. A trailer bill relating to AG notification will likely be introduced if HB 1260 passes the Senate and is signed into law.

If bills similar to the original Illinois SB 1833 bill are passed through state legislatures, this would likely lead other states to consider marketing breach provisions as well. On the other hand, passage of these types of bills would create more pressure for federal preemptive action.

Federal Trade Commission (FTC)

The ongoing theft of valuable private information has raised many important issues about how to better secure this information and protect consumers. It also poses the question of who is to blame when a breach occurs. In a recent push, the FTC is looking to place that blame squarely on companies that, in their view, leave the information available to theft. The FTC already has

brought over 50 cases against companies for failing to have adequate data security programs. A recent federal court of appeals decision in the *Wyndham* case recognized the ability of the FTC to bring data security cases under their existing authority, even in the absence of any federal data security legislation or rulemaking.

The case, *FTC v. Wyndham Worldwide Corp.*, revolves around the FTC's authority to police deceptive and unfair practices under Section 5 of the FTC Act and whether this authority gives them the power to impose specific data-security policies on companies. Wyndham argued that, if the FTC wins this case, the ruling would expose businesses that deal with customer information to a highly uncertain and unpredictable layer of FTC regulation – based on whatever the FTC determines to be an "unfair" or "deceptive" practice in an after-the-fact enforcement proceeding. The FTC sued Wyndham Hotels and Resorts LLC for data security breaches that led to more than $10.6 million in payment card fraud losses. In April 2014, the District Court for the District of New Jersey denied Wyndham's motion to dismiss the complaint. However, at the end of July, the Third Circuit Court of Appeals granted a hearing of Wyndham's appeal to dismiss the FTC data security enforcement action. After considering this appeal, the Circuit Court ultimately ruled on August 21, 2015 that the FTC could proceed with its lawsuit.

On December 9, 2015, it was announced that Wyndham would settle the lawsuit with the FTC. Under the terms of the settlement, Wyndham agreed to establish a comprehensive information security program designed to protect cardholder data (including payment card numbers, names and expiration dates), conduct annual information security audits, and maintain safeguards in connections to its franchisees' servers. Also, in the event Wyndham suffers another data breach affecting more than 10,000 payment card numbers, they are required to obtain an assessment of the breach and provide that assessment to the FTC within 10 days.

The Federal Trade Commission recently announced a new "Start With Security" initiative that will draw on the results of the lessons learned from the 53 data security cases brought by the FTC over the last few years. This initiative will include conferences around the country to help educate small- and medium- sized businesses in various industries. A conference was held in San Francisco, California on September 9 and another was held in Austin, Texas on November 5. The goal, as stated by the FTC's Director of the Bureau of Consumer Protection Jessica Rich, is to promote good data security practices and help companies avoid risks to consumer data in the first place. On September 22, ANA held a webinar to address questions raised by this new initiative – in particular, why the Commission is carrying out this road show, the key components of the conferences, and how one might be able to evaluate the trends in terms of data security enforcement.

Outlook for 2016

Data security will continue to be a very significant issue in the coming year, especially since the frequency of data breaches does not seem to be diminishing. We expect the ruling in the *Wyndham* case to have a wide-ranging reinforcing impact on the FTC's authority to police data security issues. Even though Congress did not act on the data security issue last year, there is a possibility that further action on the legislation will take place and potentially pass in 2016. In the meantime, we expect states to continue to try to fill in the gap by either creating or modifying their own extensive data security measures.

FCC's Net Neutrality Rules

Background

On February 26, the Federal Communications Commission (FCC) adopted net neutrality rules which represent a landmark change in the Internet regulatory landscape and could have significant implications for marketers. The FCC has now classified broadband services to be subject to Title II of the 1934 Communications Act. This change means that high-speed services – previously largely unregulated – will now be regulated in a similar manner to telephone companies.

Several lawsuits already have been filed challenging the new rules and initial arguments before the DC Court of Appeals already have been completed, so there may be many years of litigation. Senator Rand Paul (R-KY) recently filed legislation to repeal the new rule and similar legislation has been introduced in the House. Former Speaker John A. Boehner (R-OH) and Majority Whip Steve Scalise (R-LA) already had signaled that they planned to work on an alternative approach to net neutrality that would not allow for broadband to be classified as a utility service. Senate Commerce Committee Chairman John Thune (R-SD) is also working on a legislative approach. In addition, the Republicans in the Congress are attempting to use the appropriations process to block the FCC from making expenditures to enforce the new rule.

Privacy Roles of the FCC and FTC

It is not entirely clear what the relationship will be between the new FCC's regulation and that presently carried out by the Federal Trade Commission in regard to privacy. Under the FTC Act, the Federal Trade Commission cannot regulate an entity that is otherwise regulated as a Title II common carrier by the FCC. The FCC's action seems to have initiated a partial common carrier application. Therefore it's quite possible that the FCC and FTC will now share some jurisdiction, with two potential "cops on the beat" for broadband, operating under what may prove to be inconsistent legal mandates. This dual regulatory structure could very well make it more difficult to ascertain where regulation by one agency starts and the other ends, as well as create potential compliance conflicts when and if the agencies impose differing requirements. Even if the FCC were found to have total jurisdiction in this area, this would signal a profound regulatory change, and as the FCC has not had anywhere near the FTC's experience in the privacy area, their enforcement actions would be far less predictable.

The FTC already has raised strong concerns about these developments, noting that it would like to see a repeal of their common carrier exemption (http://katyonthehill.com/fcc-vs-ftc-a-new-privacy-turf-war/). Nevertheless, the FCC is pressing forward to implement the new rules. The FCC held a public workshop on April 28 on broadband consumer privacy issues.

FCC Commissioner Michael O'Rielly, one of the dissenting votes in regard to the net neutrality rules, spoke at our annual Advertising Law & Public Policy Conference on April 1 and discussed how the Commission is playing a larger role in regulating the advertising community. Communications law expert Robert Corn-Revere also discussed "The Brave New World at the FCC" during a session at this year's Advertising Law Conference.

Court Case

On December 4, the D.C. Circuit Court of Appeals heard oral arguments in *US Telecom Association, et al. v. Federal Communications Commission*. This case challenges the portion of the net neutrality rules that classifies Internet service providers as common carriers under Title II, a statute crafted for the decades-old telephone system. The core question in the case is whether the FCC has the power to regulate the Internet like a utility. Other issues include the regulation of mobile devices, its oversight of traffic on the back end of the Internet, and whether the FCC provided enough public notice for its rules.

Outlook for 2016

A decision in the *US Telecom Association v. FCC* case could come as early as this coming spring, about a year after the rules went into effect on June 12, 2015. Until this case is resolved, the FCC's rules will continue to be in force and will greatly impact this area.

Online Piracy

Background

Online piracy – the online trafficking in stolen intellectual property, particularly entertainment products – remains a multi-billion dollar challenge for marketers, consumers, and the entire online ecosystem. The issue for marketers in particular revolves around ads for legitimate products and services appearing on websites dealing in pirated content, providing financial support for illegal activity as well as giving these sites the appearance of legitimacy and leading consumers to believe their activity is above-board. This problem is ongoing, as a report in June from the Digital Citizens Alliance and MediaLink LLC titled "Good Money Still Going Bad" found that advertising revenues on sites dealing in pirated content totaled $209 million, nearly the same as in 2013. The report also identified 131 "premium brand advertisers" by name whose ads appear on pirate sites. The report can be viewed at http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=GMGB2.

ANA has been working for a number of years to help advertisers avoid pirate sites. In 2012, we issued a Statement of Best Practices with the American Association of Advertising Agencies (4A's), urging our members to take affirmative steps to address online piracy. The statement counseled them to include conditions in placement agreements or insertion orders with ad networks and others that would prevent their ads from being placed on sites dealing in content piracy. It also called for the development of processes to remove ads from pirate sites and to terminate non-compliant ad placements, and for refunds or credits to advertisers for any amounts paid for non-compliant placements. The ANA Legal Affairs Committee assisted in the crafting of the statement. The Interactive Advertising Bureau (IAB) signaled support for our statement. The statement can be viewed at http://www.ana.net/content/show/id/23417.

Until very recently, however, there were few technological or other solutions available to help companies meet the commitments of the Statement of Best Practices.

Trustworthy Accountability Group (TAG)

In February, ANA, the 4A's, and the IAB launched the Trustworthy Accountability Group (TAG). One of TAG's "four core areas of work" includes fighting internet piracy, which is a direct outgrowth of the Statement of Best Practices. Consulting with TAG is an Anti-Piracy Working Group, which includes ANA's Dan Jaffe. The TAG anti-piracy group recently met with the White House Office of the Intellectual Property Enforcement Coordinator to bring the administration up to date on progress in this area and to determine if there were areas where White House support would be productive.

The Anti-Piracy Working Group has helped TAG establish a Brand Integrity Program Against Piracy. This voluntary program has as its goal helping advertisers and agencies avoid placements on sites dealing with pirated content by identifying such sites and removing them from the distribution chain. The program establishes Digital Advertising Assurance Providers (DAAPs), which are certified by independent third-party validators. DAAPs provide tools to members to limit exposure to undesirable websites by meeting certain Core Criteria for Effective Digital Advertising Assurance. These criteria include identifying "ad risk entities;" helping to prevent advertisements on undesired ad risk entities; detecting, preventing or disrupting fraudulent or deceptive transactions; monitoring and assessing the compliance of ad placements, and

eliminating payments to undesired ad risk entities. Additional information about TAG's work on internet piracy can be found at https://www.tagtoday.net/piracy/.

In December, TAG announced the development of an anti-piracy pledge to fight the $2.4 billion lost each year to pirate sites. Many of the world's largest brand advertisers and agencies agreed to the pledge, which commits them to minimize placements on pirate sites by January 1, 2016. In addition, TAG also announced the first group of DAAPs are undergoing the validation process. More detail on this effort can be found at ANA's Regulatory Rumblings blog at http://www.ana.net/blogs/show/id/38054.

Outlook for 2016

It is our hope that TAG's efforts on piracy will help advertisers avoid placements on pirate sites. Our industry should be doing all it can to avoid funding illicit activity online or otherwise legitimizing websites dealing in pirated content. We will continue our work with the Anti-Piracy Working Group and will encourage ANA members to join the TAG effort.

Patent Trolls

Background

The United States patent system is vital for promoting innovation and protecting intellectual property by allowing the exclusive right to market and use new technologies and business methods for a set period of time. This system has enormous benefits both for industry and consumers. It encourages innovation, creativity, and competition by awarding an exclusive right to develop and market new products and technology. Unfortunately, the system is also subject to abuse. For a number of years, "patent assertion entities" (also known as PAEs or, more commonly, "patent trolls"), have been buying up patents on the open market and then threatening to sue creators or developers of technologies or business methods allegedly similar to the patent they own. These suits have grown more numerous in the past few years, and advertisers have not been immune. ANA is concerned that our members are being targeted with questionable demand letters, or letters sent prior to litigation that allege an infringement. ANA members and other advertisers, for example, have been challenged over their use of QR codes in ads, placing static ads in a video stream, and embedding URLs in text messages to direct a mobile device to web content. Many companies quickly settle upon receipt of a demand letter rather than face extremely costly and time-consuming litigation.

Congressional Activity

Entering 2015, it appeared as if legislation to reform the patent system was on its way to President Obama's desk. In the previous Congress, legislation shepherded by House Judiciary Committee Chairman Bob Goodlatte (R-VA) passed the House of Representatives. However, similar legislation from Senate Judiciary Committee Chairman Patrick Leahy (D-VT) never made it out of committee due to concerns over various provisions from trial lawyers and university groups, which represent major Democratic constituencies. With the Republican takeover of the Senate in the 2014 midterms, it seemed to clear a path forward for reform legislation.

In February, Congressman Goodlatte reintroduced the Innovation Act (H.R. 9), the same bill which passed the House of Representatives in late 2013. It set pleading requirements for patent suits, including requiring disclosure of parties with a financial stake in the patent and cost-shifting measures that would create a "loser pays" model where the losing party would be responsible for fees relating to the litigation. It also stated that it was the "sense of Congress" that demand letters be specific. The Innovation Act passed the Judiciary Committee in July, prior to the August recess. Another bill introduced in the House by Rep. Michael Burgess (R-TX), the Targeting Rogue and Opaque Letters Act (or TROL Act, H.R. 2045), specifically targeted demand letters by making it an unfair or deceptive act or practice under the FTC's Section 5 authority to send letters in bad faith, including sending letters alleging a right to enforce a patent that does not exist, to falsely allege that legal action has been or will be taken, or seeking compensation for an unenforceable patent. The TROL Act passed the House Energy and Commerce Committee in late April.

In the Senate, new Judiciary Chairman Charles Grassley (R-IA) introduced bipartisan legislation with immediate past Chairman Leahy and five other Senators. Like the Innovation Act, his bill, the Protecting American Talent and Entrepreneurship Act (or PATENT Act, S. 1137) sets requirements for patent suits but also has specific provisions dealing with demand letters, requiring clarity and specificity in the alleged infringement and claims being made and the

identity of those with rights to enforce the patent. This bill passed the Senate Judiciary Committee in June.

None of these bills were considered by the full Senate or House of Representatives in 2015.

Industry Activity

In 2014, we joined with the 4A's, Direct Marketing Association (DMA), the Mobile Marketing Association (MMA), and the National Retail Federation (NRF) to create an industry coalition, the Stop Patent Abuse Now (SPAN) coalition. However, due to a difference of opinion on how best to proceed in regard to the scope of legislation, this coalition was dissolved at the end of 2014. There is also conflict among our members on whether to support broad-based patent reform or to focus on the more narrow demand letter issue.

We also have joined with the 4A's in the Patent Assertion Information Aggregation and Dissemination (PAID) Program, which serves as a clearinghouse of information about patent assertions against our members. For more information, visit http://patents.aaaa.org/.

ANA Patent Infringement Defense Insurance

In August, ANA announced the creation of the Patent Infringement Defense Insurance program. Patent infringement is not typically covered under standard advertising liability policies, and stand-alone policies were not specifically addressing our members' core concerns. This program, which is exclusively offered to ANA members, provides focused patent infringement defense insurance protection for marketing and advertising activities. It allows ANA members facing a patent suit to challenge the validity of the patent or otherwise defend against the assertion at a significantly lower cost. Coverage is triggered by a patent holder demand, whether oral, written, or a Federal Court complaint, and includes litigation expenses and post-grant challenge expenses. More information on this program can be found at http://www.ana.net/content/show/id/insurance-program.

Outlook for 2016

Despite the promising start, patent legislation failed to pass in 2015. Nevertheless, there remains bipartisan pressure to "do something" regarding patent trolls. We will continue to monitor legislative developments and work with industry partners where possible to find a solution to the pressing demand letter issue.

Food Marketing

Background

The food, beverage, and restaurant industries have been under increasing pressure in recent years in response to the high levels of obesity in the United States. The creation of First Lady Michelle Obama's "Let's Move" campaign, created to foster the laudable goal of curtailing the rising rates of obesity among America's youth, and her continuing push to require schools to serve healthier food to students demonstrates the Obama Administration's strong desire to keep this issue as a key focal point.

In the last few years, bills restricting food and beverage advertising to children have been introduced in both the federal and state legislatures. Also, food advertisers faced a major fight against overly restrictive standards for food and beverage marketing to children under 18 years of age put forward by the Interagency Working Group (IWG) consisting of four federal agencies (the CDC, FDA, FTC, and USDA). Tax proposals to limit food advertising for products of "low nutritional value" also have been put forward. Pressure has grown in the last year from the media and international regulators as well.

The Interagency Working Group (IWG)

The Omnibus Appropriations Act of 2009 called for the establishment of an Interagency Working Group (composed of the CDC, the FDA, the FTC, and the USDA) to carry out a study and provide subsequent recommendations on food marketing to children and teenagers. The IWG's preliminary report was released in April 2011 and contained sweeping restrictive nutrition and advertising proposals that were labeled as "voluntary." If fully implemented, these restrictions would not have allowed the advertisement of any food or beverage to children under 18 unless it met highly restrictive, unprecedented guidelines for fat, sugar, and sodium. The restrictions would also have covered twenty types of advertising, including: word-of-mouth, sponsorships, philanthropic activities, and a catch-all "other" category. Because these proposals were predicated on the necessity of protecting children's health, ANA and other groups found the "voluntary" label to be merely a mask for efforts at backdoor regulation.

ANA partnered with sister associations and member companies to form the Sensible Food Policy Coalition (SFPC) in response to these proposals. The SFPC released a report demonstrating that if the proposals were fully implemented and complied with, 88 of the 100 most commonly consumed foods in the U.S. (including whole wheat bread, 2% milk, low-fat yogurt, and canned vegetables) would fail to meet the IWG's overly rigid nutrition standards. The Coalition also released an economic analysis that demonstrated the substantial negative impacts the proposals would have on jobs and sales if enacted.

ANA, in conjunction with the coalition, met with numerous Hill offices and engaged in a large PR effort to highlight the adverse impacts of the proposals. Dan Jaffe of ANA's Washington office testified at a hearing on this issue before two subcommittees of the House Energy and Commerce Committee. Along with coalition partners, we also worked extensively with the Appropriations Committees of both the House and Senate to urge them to block the four agencies from releasing a final report without performing a detailed cost-benefit analysis, as required by Executive Order 13563. Ultimately, as part of the final 2012 appropriations bill passed in December 2011 (the 2012 Consolidated Appropriations Act), the FTC was prohibited from using any funds to publish

a final report without first performing this type of cost-benefit analysis. This Appropriations language has been extended in subsequent appropriations bills and every continuing resolution passed since then, including this year's House and Senate FY 2016 Financial Services Appropriations bills (H.R. 2995 and S. 1910 respectively) and the Congressional Budget Continuing Resolution that took these restrictions through the end of 2016.

San Francisco Ordinances

In June, the City and County of San Francisco passed two very problematic ordinances. One requires that all out-of-home ads for "sugar sweetened beverages" contain a health warning that "drinking beverages with added sugars contributes to obesity, diabetes and tooth decay." The second ordinance bans all ads for "sugar sweetened beverages," except for several enumerated but highly limited exceptions, from any city/county property.

On July 24, a lawsuit was filed in federal court by the American Beverage Association, the California Retailers Association and the California State Outdoor Advertising Association challenging on First Amendment grounds the ordinance that bans advertising on public property (http://www.ana.net/getfile/22663). The lawsuit states that a subsequent filing would challenge the other ordinance as well. In early December, the San Francisco Board of Supervisors unanimously voted to repeal the ordinance prohibiting the advertisement of soda on public property (http://www.ana.net/blogs/show/id/37991). The Board finally revoked this ordinance after the City Attorney, citing a recent Supreme Court case, reversed his legal opinion as to its constitutionality.

ANA is very pleased that this unconstitutional law was repealed. However, Supervisor Malia Cohen, the sponsor of the original ordinance, has vowed to keep fighting against the soda industry. The second San Francisco advertising restriction ordinance remains in place, but we are confident that it will be reversed by the courts. ANA plans to file an *amicus* friend of the court brief in opposition to this ordinance as a violation of the First Amendment. Clearly, if this ordinance is not struck down, it will create vast new precedents impacting numerous areas of advertising throughout the United States.

Children's Food and Beverage Advertising Initiative

The most powerful self-regulatory approach to the food marketing issue is the Children's Food and Beverage Advertising Initiative (CFBAI), launched by the Council of Better Business Bureaus (CBBB) in 2006. Under the original initiative, participants were required to direct at least 50 percent of food and beverage advertisements directed toward children to foods and beverages that were healthier or "better for you." Foods and beverages labeled as "better for you" were designed to meet established government and scientific standards as established by the FDA and USDA. In addition, participants agreed to reduce the licensing of third party characters in promoting foods, agreed not to use product placement of foods and beverages in programs directed to children under 12, and agreed not to advertise foods and beverages in elementary schools.

CFBAI standards have been revamped and strengthened twice in recent years. In January 2010, the initiative was expanded to include advertising in child-directed video games, cell phone ads targeting children, and word-of-mouth advertising. Participants also were required, starting in January 2010, to target 100 percent of food and beverage advertisements to children 12 and

under to healthier products. In July 2011, CFBAI began requiring its participants to use uniform nutrition standards for advertising food and beverage products to children with limits on sugar, saturated fats, and sodium varying for different categories of food. These standards were fully implemented by participating companies by December 31, 2013 (http://www.bbb.org/us/storage/16/documents/cfbai/CFBAI-Category-Specific-Uniform-Nutrition-Criteria.pdf). Seventeen companies currently participate in CFBAI, and those companies represent roughly 80 percent of the food and beverage advertisements seen on children's programming.

Healthy Weight Commitment Foundation

The Healthy Weight Commitment Foundation (HWCF), formed in 2009, is a CEO-led organization of more than 300 retailers, food and beverage manufacturers, restaurants, sporting goods and insurance companies, trade associations, nongovernmental organizations (NGOs), and professional sports organizations (http://www.healthyweightcommit.org/). The goal for HWCF is to help reduce obesity, especially in children. Many of ANA's largest food and beverage advertisers are part of HWCF. In May, HWCF announced that members had surpassed their goal of removing 6.4 trillion calories from the marketplace, which represents a 78 calorie reduction per person, per day. This announcement came 3 years ahead of schedule – and member companies have no intention to stop furthering this effort.

The work of HWCF clearly shows the industry's positive response to consumer demands for healthier food and beverages. In recent months and years, we have seen encouraging signs that the high obesity levels in this country have stopped increasing. A study released in September showed that adult obesity rates remained mostly steady over the last year (http://thehill.com/regulation/254360-state-obesity-rates-are-stabilizing-report-finds). We expect these trends to continue downward as even more calories, fats, and sodium are removed from foods and other societal steps to combat obesity continue to be pursued forcefully.

Congressional Activity

On March 26, 2015, Rep. Rosa DeLauro (D-CT) introduced H.R. 1687, the SWEET Act or Sugar-Sweetened Beverages Tax Act of 2015 (https://www.congress.gov/bill/114th-congress/house-bill/1687). This bill would impose an excise tax of one cent per teaspoon (4.2 grams) of caloric sweetener (sugar or high-fructose corn syrup). It contains exemptions for 100% fruit or vegetable juice, milk, infant formula, or other nutritional supplements. The bill was referred to the House Ways and Means Committee and the Energy and Commerce Committee and is awaiting further action.

In July, the House passed the Safe and Accurate Food Labeling Act of 2015, H.R. 1599 (https://www.congress.gov/bill/114th-congress/house-bill/1599/titles). This legislation would prevent states from issuing mandatory labeling laws for foods that contain genetically modified organisms, often called GMOs. The bill would instead create a federal standard for the voluntary labeling of foods with GMO ingredients. H.R. 1599 passed 275-150 and was moved to the Senate, where it has been referred to the Committee on Agriculture, Nutrition, and Forestry and saw no further action in 2015.

Vermont Genetically Modified Organism (GMO) Labeling Law

Last year, Vermont passed a law making it the first state to require labeling of food containing GMOs. The law requires manufacturers and retailers to identify whether raw and processed food sold in Vermont was produced in whole or in part through genetic engineering. It also prohibits manufacturers from labeling or advertising foods with GMOs as "natural," "naturally made," "naturally grown" or "all natural." In a joint lawsuit, the Grocery Manufacturers Association (GMA), the Snack Food Association, the International Dairy Foods Association and the National Association of Manufacturers sued to stop the law from going into effect. However, in April 2015, U.S. District Court Judge Christina Reiss decided to allow Vermont to proceed with implementing its law. GMA is now appealing the federal court decision, arguing that the law will disrupt food supply chains, confuse consumers and lead to higher food costs. The law is set to take effect July 1, 2016.

International Activity

World Health Organization
In August, the World Health Organization (WHO) published an interim report of the Global Coordination Mechanism (GCM) Working Group on engagement with the private sector on non-communicable diseases (NCDs). The interim report acknowledges the role that industry can play in reducing children's exposure to "unhealthy" food marketing but also states that self- or co-regulation are 'generally not sufficient to ensure meaningful progress' (http://www.who.int/global-coordination-mechanism/interim-report-private-sector-engagement/en/). The report claims this fact is evidenced by the uneven marketing commitments in developed countries (which have developed national regulatory and statutory frameworks) versus developing countries, and the "low" standards set by the industry in order to achieve high compliance rates. The report also draws a parallel between "unhealthy" food marketing and tobacco marketing, emphasizing how governments can take inspiration from legislation enacted in other countries. ANA is a key member of the World Federation of Advertisers (WFA) which has actively provided input to the WHO on their reports.

China
On April 24, China's top legislative body adopted a revised Advertising Law, which will introduce a series of new provisions. This law became effective on September 1. The new law will prevent children under the age of 10 from endorsing products in advertisements, ban in-school advertising and advertising on educational materials (such as textbooks, stationery, uniforms and school buses), and ban the advertising of dairy products that "claim to partly or completely substitute breast milk" in media and public venues.

Advertisers, clients, agents and publishers who violate the rules could face a fine, 3-5 times the production cost of the advertisement. China's new law encourages industrial associations to self-regulate and develop advertising standards in order to promote responsible marketing communications and improve the credibility of the industry as a whole.

Chile
In April, Chilean President Michelle Bachelet signed into law the implementing regulation to the 2012 Law 20.606 on Nutrition and the Composition of Food and its Advertising, which sets the nutrition criteria applicable to the marketing and labelling of processed food and beverage products (http://www.leychile.cl/Navegar?idNorma=1041570).

All advertisements to children under the age of 14 exceeding the set values for energy, sodium, total sugar, and saturated fat will be banned and the products will have to carry a warning label. Additionally, products not meeting the nutrition criteria cannot be sold, marketed, promoted, or advertised in preschools, primary or high schools. Food prepared on the premises for immediate consumption, as well as food intended for infant consumption, are exempted from the regulation.

WFA provided comments to the informal consultation through ANDA Chile – Chile's national advertising association – and the local food industry. WFA worked with GMA and local associations in order to ensure industry input is aligned.

Mexico
In January 2014, a 1 peso per liter tax (about 10 percent) was added to the price of all sodas and so-called sugary drinks in Mexico. The government also added an 8 percent tax on "unhealthful snacks," like potato chips and cookies. A 2015 study showed that in the year since this tax was implemented, there has been a decrease in the consumption of the targeted products, especially among the lowest socioeconomic group. The government collected a total of $1.3 billion in 2014 from the tax. The study did not acknowledge any adverse impact the tax has had on the business community. Before the tax was adopted, the WFA and other advertising groups urged the Mexican government against this action as it would be very harmful to the food advertising community and unfairly disadvantage certain products.

Outlook for 2016

Recently, there has been some good news in regard to the issue of obesity. Several studies now have shown a significant change in U.S. eating patterns with Americans on average consuming fewer calories. This, however, is not likely to stop consumer groups or regulators from pushing for more restrictions to combat obesity. We expect food, beverage, and restaurant advertising to remain a major issue. As long as obesity continues to be a significant health crisis, there will be pressure on lawmakers and regulators to take forceful action. ANA will continue to work with coalition partners and members to highlight the numerous and significant positive efforts of industry.

Tobacco Advertising

Background

Advertising of tobacco products is severely restricted in the United States. The tobacco companies agreed to voluntary restrictions on advertising and marketing under the 1998 Master Settlement Agreement between them and 47 state attorneys general. It is further restricted by the Family Smoking Prevention and Tobacco Control Act, which passed in 2009, granting regulatory authority over tobacco products and advertising to the Food and Drug Administration (FDA). This law, as originally written, placed strong limits on the use of colors, illustrations, and pictures in advertisements and established new warning label requirements on packaging and in ads, the parameters of which were to be determined by the FDA. It set strict limits on ad placement in publications with an under-18 year-old readership of 15% or greater and on outdoor advertising within 1,000 feet of schools or playgrounds. A number of these provisions were challenged in court, including amicus (friend-of-the-court) briefs filed by ANA. The FDA's final warning label rule was also challenged. While the provisions relating to color and images in ads were later found unconstitutional, other provisions relating to warning labels and sponsorships were upheld. The FDA's original warning labels for tobacco packaging and ads, which were highly graphic and disturbing, were thrown out on First Amendment grounds as well. The agency now has gone back to the drawing board.

The growing popularity of e-cigarettes and so-called "vaping" has further reignited the debate over tobacco advertising. The FDA does not presently have regulatory power over e-cigarettes or their advertising.

Congressional Activity

Legislation introduced in both the House of Representatives and Senate would limit the promotion and marketing of e-cigarettes. This bill, the Protecting Children from Electronic Cigarette Advertising Act of 2015 (S. 430/H.R. 478) was introduced in the Senate by Senator Barbara Boxer (D-CA) and in the House by Rep. Elizabeth Esty (D-CA). It would prohibit the advertisement, promotion, or marketing of an electronic cigarette product in a manner that the advertiser knows or should know would increase the use of e-cigarettes by those under 18. It would be enforced by the Federal Trade Commission and state attorney general, with penalties for violations starting at $16,000. While the bill has nine Senate co-sponsors and 39 in the House, neither bill has been considered in committee.

An additional bill dealing with e-cigarettes was introduced by Rep. Jackie Speier (D-CA). Her bill, the Stop Selling and Marketing to Our Kids E-Cigarettes Act (or SMOKE Act, H.R. 1517), would give the FDA regulatory authority over e-cigarettes and would prohibit marketing or promotion that would have the effect of increasing use by children. As with the Boxer/Esty legislation, this bill has not been considered in committee.

Outlook for 2016

It has been over two years since the FDA decided to scrap the tobacco warning label rule, so it remains to be seen what type of final labels will eventually be required. Any new rule would likely be challenged in court. In the meantime, the debate over the use of e-cigarettes and their

impact on children will continue, with further legislative activity expected at both the federal and state levels.

ICANN Top Level Domain Expansion

Background

The Internet Corporation for Assigned Names and Numbers (ICANN) is the non-profit organization that operates the Internet Domain Name System under a contract with the Department of Commerce's National Telecommunications and Information Administration (NTIA). In June 2011, ICANN's Board of Directors approved a plan to vastly expand the number of Top Level Domains (TLDs) on the Internet, which are those labels that appear to the right of the dot in an Internet address (e.g., ".com" and ".org").

Although ANA had consistently expressed concerns to ICANN about the proposed virtually unlimited Top Level Domain rollout, we significantly ramped up our activities after the formal and full-speed-ahead approval of the program in 2011. We organized the Coalition for Responsible Internet Domain Oversight (CRIDO), consisting of 181 national and international companies, associations, and organizations. CRIDO sent a petition to NTIA in November 2011 asking NTIA to use its best efforts to urge ICANN to delay the roll-out of the program. ANA took a primary leadership role for almost two years in focusing a spotlight on the serious unresolved problems with ICANN's plan for the vast expansion of generic TLDs. We helped activate the law enforcement community, the non-profit community, as well as other important sectors to weigh-in on this program.

Additionally ANA lobbied the FTC and Congress for support of our position. This culminated in two congressional hearings at which ANA testified, as well as an expression of strong opposition to the program from then FTC Chairman Jon Leibowitz who stated that without additional protections built into the process, the rollout would be a "disaster" for consumer protection.

Since the initial roll-out, more than 800 new gTLDs have launched, passed through the sunrise period, and are in the general availability phase. Currently over 11 million second level domain names have been registered. However, those numbers are largely artificially inflated as many gTLD registries have either reserved names in dummy registrations to sell them later for premium prices or they have given domain names away for free to increase notoriety for the gTLD. The only gTLD to have above 1 million registrations is .xyz. Only 17 other new gTLDs have more than 100,000 registrations. In comparison, .com has 118 million domain registrations and logs a new registration roughly every second.

ICANN's CEO, Fadi Chehadé, announced that he will be stepping down in March. In the meantime, serious concerns continue over the approval of domain names such as ".sucks", ".porn" and ".wtf". A company called Vox Populi is charging $249 for ".sucks" registrations. But if marketers want to defend themselves against someone who seeks to register their brands attached to ".sucks," that costs $2,499 for each defensive registration. Those defensive registrations may also have to be obtained in multiple languages in order to protect global brand names.

Domain Name Battles

Since the rollout of new domain names began in 2012, several battles have sprung up over who should have the rights to those TLDs. In 2013, ICANN set up its Trademark Clearinghouse (TMCH) brand database to protect brands and help businesses register domain names for which

they have the legitimate rights. However, many companies, and even some countries, claim that they are not being adequately protected in this system and that TLDs of importance to them are being offered up for general sale.

The most notable debate to date is over the .wine and .vin domain names. When ICANN launched the new gTLD Program, several private firms applied for .wine gTLDs. France initially started the uproar over .wine and .vin, calling the general sale of these TLDs a threat to the country's desire to "preserve the cultural diversity" built on the Bordeaux, Burgundy and Champagne wines and wine regions. Wineries in the U.S. soon followed suit in trying to defend themselves, particularly those in California. They cited either insufficient or non-existent safeguards to protect them from nefarious individuals buying the .wine and .vin domain names. The European Federation of Origin Wines issued a statement to ICANN in 2013 arguing that the new gTLDs infringe on intellectual property rights. ICANN issued a 60 day deadline to resolve the debate by June 3, 2014, but its delegates failed to reach an agreement and ICANN declared in a statement that it "continued processing of the .vin and .wine applications."

Internet Oversight Transition

In March of 2014, the Department of Commerce announced its intent to begin a transition of its contractual oversight of key domain name functions which would be transferred to the global multi-stakeholder ICANN community. This proposal to transfer the NTIA's IANA (Internet Assigned Numbers Authority) contract to ICANN triggered considerable backlash from Republicans in the Congress, who have argued that the move would give more power to authoritarian countries to take over the governance of the Internet.

Congressman John Shimkus (R-IL), a senior member of the House Energy and Commerce Committee, introduced H.R. 805, the DOTCOM Act, which states that the U.S. cannot hand over the oversight of ICANN unless the GAO provides a thorough report to the Congress evaluating the pros and cons of such a transfer and an evaluation of the adequacy of existing safeguards. The bill passed the House in June of this year. Senator John Thune (R-SD), Chairman of the Senate Commerce Committee, has also introduced a companion bill to the DOTCOM Act in the Senate. Regardless of what happens with that legislation, NTIA recently announced that the transition would be moved back a year until the middle of 2016, at which point the IANA contract could be extended for up to three additional years if needed.

GAC

In August 2014, the ICANN Board proposed a major amendment to its bylaws that would force ICANN to adopt all Government Advisory Committee (GAC) advice unless two-thirds of ICANN's non-conflicted board members vote to oppose the advice. Already, GAC, which is made up of more than 100 diverse countries, has a substantial amount of influence within ICANN because its advice must be taken into consideration in all Board decisions. When ICANN's Board proposes actions inconsistent with GAC advice, it must give reasons for doing so and work with GAC to reach a mutually acceptable solution. This proposed change could radically impact the future of ICANN, basically providing governmental authorities extraordinary say as to ICANN policy, and could pose significant challenges for brands. Many of the countries in the GAC are totalitarian in nature and do not have much concern about free speech protections in general or commercial rights of brand holders in particular. Also, there are no requirements to provide transparency in their policy development or to provide a basis for their recommendations. ANA

filed comments in September 2014 in opposition to this proposal and urged all member companies and their affiliate associations to file in opposition as well (http://www.ana.net/getfile/21365). In February 2015, ANA filed comments with the Senate Commerce Committee raising concerns about the GAC's power and urging the Committee to consider this when deciding on the timeline for the IANA transition.

There was an important decision in July of this year by an Independent Review Panel (IRP) which sharply criticized the actions of ICANN and particularly those of the GAC and demanded a further reevaluation of the decision in regard to the .africa decision (http://www.ana.net/blogs/show/id/36154). This marks the first time ICANN's decisions and particularly those of the GAC have been substantively reviewed by an external body and found wanting. This development gives some hope to brand owners that there will be some independent oversight in the process going forward.

In December, ANA submitted comments to ICANN on a dangerous proposal that would require a 2/3 vote by the ICANN Board to reject GAC advice. ANA believes this proposal would create a dangerous new precedent whereby GAC would have even more power within ICANN to derail the domain name application process. Moreover, the proposal has the potential to decrease ICANN's accountability since it would make it more difficult to move in a different direction once GAC has spoken. Although GAC is supposedly an "advisory" body, this proposal would transform it clearly into a "decision-making" body, which is contrary to well understood perceptions in the multistakeholder community.

Outlook for 2016

We will continue to track developments regarding ICANN and the IANA transition. If successful, ICANN's efforts to take control of the IANA contract will create even less oversight by the Department of Commerce and the NTIA over its activities. This means that Internet governance will be even more dominated by domain name registrars who have not proven highly concerned about trademark and other protections due advertisers and by countries that have not proven to be committed to sustaining a free and open global Internet. As the IANA transition is now set to occur in mid-2016, ANA will provide input and continue to urge lawmakers to carefully consider the negative implications of handing over control of the contract.

Judicial Activity

Background

The First Amendment is the ultimate safety net for the marketing community. Since 1976, advertising has been afforded strong constitutional protection in a series of decisions handed down by the U.S. Supreme Court. In the landmark *Central Hudson* case in 1980, the Court set out a four-part test to determine when restrictions on commercial speech violate the First Amendment. This test has been used in the intervening years to strike down numerous laws and regulations that impinge on the First Amendment rights of advertisers and marketers. In fact, in 2003's *Western States* decision, the Court held that any restrictions on speech must be a "last – not first – resort." ANA has been a major player in the development of the Court's First Amendment jurisprudence, joining cases when necessary and filing "friend of the court" briefs. There have been several cases this year of great interest to our industry.

Recent Cases

Reed v. Town of Gilbert, Arizona
The U.S. Supreme Court issued a unanimous decision on June 18 that could have very significant implications for the level of First Amendment protection that advertising enjoys. The Court struck down a town sign ordinance that had different rules and standards for signs that could be displayed, based on the type of event and the content of the sign. While the ordinance could likely have been struck down under existing First Amendment principles, the Court held that the content-based law was subject to a higher standard of "strict scrutiny." That standard requires the government to prove that the challenged law is "narrowly tailored to serve compelling state interests."

This is a higher standard than has traditionally been applied in commercial speech cases. In previous cases, the Court has held that laws were content-based if they were passed to suppress speech with which the government disagreed. Here, the Court seemed to say that any law that singles out a topic for regulation and discriminates based on content is presumptively unconstitutional. Legal scholars are debating the potential scope of the decision and its impact on various forms of government regulation of speech. While she supported the result, Justice Kagan wrote a separate opinion warning that when lower courts apply the Supreme Court's sweeping decision to review various sign laws across the country, the Supreme Court will "find itself a veritable Supreme Board of Sign Review."

Amarin Pharma, Inc. v. United States Food and Drug Administration
On August 7, the U.S. District Court for the Southern District of New York ruled that Amarin Pharma, Inc. can make truthful, non-misleading statements to doctors about off-label uses of Vascepa, the company's triglyceride-lowering drug. The court's decision was a preliminary injunction, not a final order. Amarin Pharma, expressing the fear that the FDA would bring misbranding charges against the company, sought a preliminary injunction to ensure its ability to engage in truthful and non-misleading speech with doctors about the off-label uses of Vascepa. In granting the injunction, the court emphasized that the First Amendment does not protect false or misleading commercial speech and placed the burden on Amarin going forward to ensure that its communications with doctors remain truthful and non-misleading as new information about the product is acquired.

The marketing of pharmaceutical products is heavily regulated by the FDA. This is the first case where a company has potentially achieved the right, for First Amendment purposes, to engage in off-label promotion. This case is one more demonstration of the growing wariness of the courts to allow any government entity to impose blanket suppression of a category of speech without strong proof that the communication will be false or deceptive.

Direct Marketing Association v. Brohl
The U.S. Supreme Court issued a unanimous decision on March 3 which protects the ability of business groups to challenge state tax laws.

The Direct Marketing Association (DMA) challenged a Colorado law that requires out-of-state merchants with sales over $100,000 in Colorado to disclose confidential information about their customers' purchases to the state's revenue department. The purpose of the law is to make it easier for Colorado to collect sales and use taxes on e-commerce purchases by its residents. The DMA argued that the law was an unconstitutional restriction on interstate commerce. The U.S. District Court for the District of Colorado agreed, but on appeal, the U.S. Court of Appeals for the Tenth Circuit held that the federal courts had no jurisdiction over the case because of the Tax Injunction Act, which prevents federal courts from interfering in local collection of taxes. The Tenth Circuit opinion can be viewed at https://www.ca10.uscourts.gov/opinions/12/ 12-1175.pdf.

The DMA appealed to the U.S. Supreme Court. ANA subsequently joined with the National Federation of Independent Business (NFIB) Small Business Legal Center, NetChoice, the Electronic Retailing Association (ERA), and the American Catalog Mailers Association in a "friend of the court" brief. Our brief can be read at http://www.ana.net/getfile/21384. Our brief contended that the Tenth Circuit's reading of the Tax Injunction Act is in conflict with both the text and legislative history of the law and that it unlawfully restricts interstate commerce, as it will encourage states to enact legislation that imposes burdens selectively on out-of-state retailers.

We therefore are very pleased that the Supreme Court subsequently overturned the Tenth Circuit, allowing the challenge to the Colorado law to proceed (http://www.dmnews.com/news/dma-wins-supreme-court-case-in-unanimous-decision/article/401430/).

The American Beverage Association, California Retailers Association, California State Outdoor Advertising Association v. The City and County of San Francisco
San Francisco passed two ordinances to restrict severely the advertising of specified sugar sweetened products on city property and on billboards throughout the city. These proposals in ANA's view are clearly unconstitutional. Fortunately, the ordinance to ban this type of advertising on public property has since been withdrawn, and we intend to file an *amicus* "friend of the court brief" to oppose the remaining ordinance. These ordinances are discussed in more detail in the *Food Marketing* section of the compendium on page 23.

In re Tam
The United States Court of Appeals for the Federal Circuit held *en banc* that Section 2(a) of the Lanham Act, which bars the Patent and Trademark Office ("PTO") from registering "scandalous, immoral, or disparaging marks," violates the First Amendment. *In re Tam*, 2015 WL 9287035 *8-9 (Fed. Cir. Dec. 22, 2015) (*en banc*). The court confined its ruling to the prohibition on "disparaging" trademarks because the case involved the denial of registration to a rock band

named "The Slants," which PTO had ruled was disparaging to members of the Asian community. But the broad language of the decision leaves little doubt that the remaining parts of Section 2(a), relating to "immoral" or "scandalous" trademarks, are equally unconstitutional. The case will have an immediate impact on other similar trademark disputes – such as the one involving registration for the Washington Redskins – but it will affect broader questions involving the commercial speech doctrine as well. The court held that content-based restrictions on trademark registrations are subject to strict scrutiny notwithstanding the fact that the marks relate to commercial products or facilitate commerce. It declined to apply less rigorous constitutional review of commercial speech because the restrictions were aimed "at the expressive component of speech," and not "the commercial component." The court explained that the applicable First Amendment standard "depends on which aspect of the speech is targeted by the measure being reviewed." The court also held that strict review was required even though a lack of registration does not constitute a prohibition on its use. Applying the doctrine of unconstitutional conditions, it held that denial of the benefits associated with trademark registration unconstitutionally burdens protected speech. The court forcefully rejected the argument that federal registration of trademarks involves "government speech," and it denied government authority to reject a proposed trademark on grounds that registration is a form of "subsidy." The decision forcefully rejects government authority to regulate speech on grounds it is offensive or disparaging, and it expressed significant reservations about the inherent vagueness of such concepts.

Outlook for 2016

After a few quiet years, there are a number of cases working their way through the courts dealing with commercial speech. We will continue to monitor these cases to ensure that advertising and marketing retain their broad protection under the First Amendment. We will be active in intervening either directly or through "friend of the court" briefs whenever needed.

International Advertising Developments

Background

ANA routinely tracks advertising issues that occur outside the U.S. We are a member of the Board of the World Federation of Advertisers (WFA) and represent the largest advertising group within the WFA. The WFA is a global federation of multinational companies and national trade associations advocating for responsible and effective advertising practices. Food advertising and privacy rights continue to be major subjects of international focus.

Food Marketing Restrictions Internationally

Europe presently is a major center of activity on the food advertising front. The World Health Organization (WHO) has published an interim report of the Global Coordination Mechanism (GCM) Working Group on engagement with the private sector on non-communicable diseases (NCDs), which acknowledges the role that industry can play in reducing children's exposure to "unhealthy" food marketing but also states that self- or co-regulation are 'generally not sufficient to ensure meaningful progress' (http://www.who.int/global-coordination-mechanism/interim-report-private-sector-engagement/en/). The World Federation of Advertisers (WFA) has actively provided input to the WHO demonstrating the positive efforts of self-regulation and food company efforts in response to this and other reports.

Elsewhere in the world, China revised its Advertising Law to include a series of new provisions. The law now prohibits children under the age of 10 from endorsing products in advertisements, bans in-school advertising and advertising on educational materials (such as textbooks, stationery, uniforms and school buses), and bans the advertising of dairy products that "claim to partly or completely substitute breast milk" in media and public venues.

Also, Chile has adopted a new law implementing the 2012 Law 20.606 on Nutrition and the Composition of Food and its Advertising, which sets the nutrition criteria applicable to the marketing and labelling of processed food and beverage products (http://www.leychile.cl/Navegar?idNorma=1041570). All advertisements to children under the age of 14 exceeding the set values for energy, sodium, total sugar, and saturated fat will be banned and the products will have to carry a warning label.

Many countries have also established taxes on sugary or otherwise "unhealthy" foods in the past several years, especially in Central and South America. ANA and WFA continue to fight against these new barriers to advertising and alert our members when these developments arise. Further discussion is contained in the "Food Advertising" section of the Compendium on page 25.

Privacy in the EU

Additionally, online behavioral advertising (OBA) in Europe has been a topic of growing concern in recent years. In 2009, the EU Parliament passed a "Cookie Directive" calling for websites to have opt-in consent from consumers for the use of tracking cookies related to online behavioral advertising. Individual member states are responsible for implementing the directive via legislation, which went into effect in May 2011.

U.S. companies typically comply with EU privacy laws through a Safe Harbor Framework agreement between the European Commission and the Department of Commerce (http://export.gov/safeharbor/eu/eg_main_018365.asp). This framework, however, has been increasingly called into question by those in the EU who feel U.S. data brokers are abusing the system. Nonetheless, privacy regulations in Europe have a significant effect on U.S. companies, due to the large amount of Internet business carried out on a global basis. Also, the DAA OBA Self-Regulatory Program has recently been extended to the EU and will hopefully serve as an alternative to more restrictive regulatory proposals (http://www.youronlinechoices.eu) in regard to privacy issues.

Another front where the EU has gone far beyond traditional privacy regulations is in the recent so-called "Right to Be Forgotten" court ruling. Last year, the European Court of Justice ruled against Google in a case brought by a Spanish man who wanted the link to an article about the auction for his foreclosed home to be removed. The court ruled that search engines are responsible for the content they link to, and for that reason Google was required to comply with EU data privacy laws and remove links for which an individual mentioned in an article had a valid request to take it down.

This development in the EU has had major implications on freedom of expression around the world. It also starkly demonstrates the different paths the EU and the United States are taking on privacy issues. In the United States, such a ruling would violate the strong constitutional protections provided by the First Amendment in favor of free expression. Signals such as these from Europe indicate that the EU may be in the process of taking far more strident positions on privacy issues across the board. Advertisers are likely to be drawn into the debate as the EU moves forward in regard to data privacy and security.

Addtionally, in December, the European Parliament, the European Council, and European Commission reached a new agreement on data protection rules in the EU. These new rules include a broader definition of personal data to include most types of data, including email addresses and IP addresses; allowing member states to determine when parental consent is needed online; requiring explicit consent for the use of data for online marketing purposes; and requiring 72 hours' notice to national authorities in the event of a data breach. The final regulations must be approved by the European Parliament in 2016 and any new regulations are expected to take effect by 2018.

Outlook for 2016

ANA will continue to monitor developments overseas. Issues affecting advertising internationally can affect our members, as many of them have significant operations worldwide. In addition, regulatory actions in other countries often serve as models for proposed regulatory actions in the United States. ANA will continue to work closely with the WFA to respond to these threats wherever they arise.

2015 ANA Advertising Law & Public Policy Conference

The eleventh annual ANA Advertising Law & Public Policy Conference was held March 31-April 1 at the Four Seasons Hotel in Washington, D.C. Keynote speakers included FTC Commissioner Terrell McSweeny, FCC Commissioner Michael O'Rielly, and Mississippi Attorney General and President of the National Association of Attorneys General Jim Hood.

Attendance was the second best in the conference's history, only surpassed by 2014's record attendance. The conference continues to receive high quality marks for content and venues in the post-conference survey. Highly rated sessions included discussions on social media and advertising in the age of review sites.

Other sessions included panels on data security, commercial production overseas, the political environment for advertising and marketing, advertising self-regulation, negotiating client-agency agreements, and native advertising.

We are in the planning stages for the next Advertising Law Conference. The 2016 conference will take place April 6-7 at the Westin River North in Chicago, Ill.

ANA Legal & Regulatory Webinar Program

In 2014, ANA initiated a series of six webinars on legal and regulatory issues to both complement the annual Advertising Law & Public Policy Conference and to explore important advertising law topics in a more in-depth manner. Webinars take place every other month and are conducted by industry legal experts. There were six webinars in 2015, covering programmatic buying, the use of drones in marketing, native advertising, vendor endorsements in commercial general liability insurance policies, the FTC's data security initiatives, and privacy and other legal concerns generated by the Internet of Things (IoT) and other new technologies. This program has been a major success and has increased member engagement with the Government Relations office. We plan on holding the same number of webinars in 2016.

ANA Legal Affairs Committee

The ANA Legal Affairs Committee was created in 2003 to address, discuss, and seek solutions to the numerous legal and regulatory issues advertisers face that relate to challenges to their advertising content and practices. It is open to all ANA members with an interest in legal and regulatory issues. The Committee currently has 95 members. It meets three times a year, with one meeting held on March 30 in conjunction for the first time with the ANA Advertising Law & Public Policy Conference. Additional meetings took place on July 22 and October 28. Four meetings are planned for 2016, including a pre-Ad Law Conference meeting in April.

Coalitions

ANA is a member of a number of coalitions that bring together diverse sets of groups sharing an interest in protecting the rights of advertisers. These coalitions provide a united front in lobbying Congress and government agencies on advertising issues and they help strengthen our efforts on behalf of our members. They have been beneficial in areas such as advertising tax deductibility, children's food and beverage advertising, privacy and interest based advertising (at both the federal and state levels), direct-to-consumer prescription drug advertising, and dealing with patent trolling.

The Advertising Coalition (TAC)
The Advertising Coalition was established in 1988 in order to counter federal ad tax proposals and has expanded its scope to general advertising issues. TAC members now include a wide range of companies and associations from various types of media that are heavily dependent on advertising revenue. TAC has held numerous grassroots meetings on federal ad tax issues and also worked to defeat proposals that would eliminate the tax deduction for prescription drug advertising.

TAC also has sponsored the development of the IHS Economics & Country Risk study on the economic impact of advertising. The study, carried out using an updated economic model developed by Nobel Laureate in Economics, Lawrence Klein, demonstrates the enormous positive economic impact of advertising for the U.S. economy, every state, and each individual congressional district.

ANA played a critical role in providing substantial funding for the 2010, 2013, and 2015 updates of the IHS study. The 2015 update showed that advertising expenditures supported 20 million jobs in the U.S. and accounted for $3.4 trillion in economic output. Every dollar spent on advertising generates nearly $19 of economic output that would not have otherwise existed and advertising supports almost 20% of the U.S. gross domestic product (GDP). This is a critical arrow in our quiver for ad tax fights and is used extensively in our meetings with members of Congress and their staffs.

The Alliance for American Advertising (AAA)
The AAA consists of a number of trade associations and large companies and focuses primarily on advertising issues related to food and obesity. In recent years, the AAA has carried out major lobbying efforts in regard to broad proposed expansions of FTC rulemaking power in the Dodd-Frank Wall Street Reform Bill and the proposed food marketing guidelines of the Interagency Working Group (IWG) on Food Marketed to Children.

Digital Advertising Alliance (DAA)
ANA is a founding member of the Digital Advertising Alliance, which administers the Self-Regulatory Program for Online Behavioral Advertising. Other members include the 4As, DMA, IAB, and AAF. Since the DAA program has been in operation, the AdChoices icon has been placed multi-trillions of times. The quick and successful work of the DAA in providing consumers education and meaningful choices about data collection for Interest Based Advertising purposes has received significant praise from many important leaders in the Congress, the FTC, and the White House. In 2014, the program was expanded to include the mobile environment, and in 2015 DAA started enforcing its mobile guidance. More information

about the important work of the DAA can be found in the Privacy and Online Behavioral Advertising section on page 10.

State Privacy Coalitions
ANA is a member of two coalitions working on state privacy issues. One coalition is led by the DLA Piper Law Firm and is active on privacy issues in all states. This year, it has focused extensively on a data security bill in the Illinois legislature and privacy legislation put forward in California. In addition, we are a member of the California Chamber to work on privacy issues in that state.

Patent Troll Coalitions
ANA is working with several coalitions to address the growing burden to industry posed by patent assertion entities (PAEs), also known as "patent trolls including the "Big Tent" Coalition which cuts across nearly every sector of the business world. Additionally, the ANA and the 4As have assembled a task force to address indemnification issues in regard to advertisers and ad agencies when patent litigation occurs. ANA also has developed insurance options for our members in regard to patent troll threats. More information about ANA's work through coalitions in this area is available in the Patent Trolls section on page 22.

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