

The Commission recognizes that some industries are particularly well-suited to self-regulation. In a rapidly-evolving marketplace, a responsive self-regulatory body may be more nimble than government regulators at addressing changes and correcting problems. Thus, for over twenty years, the Commission has had “useful relationships with self-regulatory groups”

that the Commission evaluates each referral on the merits, and makes an informed, independent judgment on whether to take any further action.¹⁰

IV. REVIEW OF THE EFFECTIVENESS OF SELF-REGULATION IN PARTICULAR INDUSTRIES

Let me turn now to several industry-specific areas where the Commission has encouraged greater and more effective self-regulation. In some of these areas, self-regulation appears to be working well. In other areas, consumers, public interest groups, or members of Congress may be frustrated by a perceived lack of progress – which may result in calls for government regulation.

A. Media Self-Regulation

The first area I would like to discuss is media self-regulation, particularly in the context of weight loss claims. Obesity has been described as an “epidemic” and a national “health crisis.”¹¹ Deceptive and fraudulent marketers have attempted to take advantage of this crisis by making outrageous promises that consumers can lose several pounds in a week, while eating all their favorite foods and not exercising.

The FTC has encouraged the media to screen out these patently false weight loss ads and not air them. In 2003, the FTC staff issued “Red Flags: A Reference Guide for Media on Bogus Weight Loss Claim Detection.”¹² The guide lists weight loss claims that broadcasters and publishers can easily spot as being patently false, and thus screen out before they are disseminated. Some false

! causes substantial weight loss by wearing the product on the body or rubbing it on the skin.¹³

In November 2004, the Commission followed up the release of this guide with law enforcement actions brought against these marketers of weight loss products who put forth patently false claims. Beyond targeting the marketers themselves, the Commission also mentioned in the complaints (as well as its press release) the names of many of the publications that ran these false ads.¹⁴ We hoped that by highlighting the names of these publications, we might alert both the publications and consumers to the fact that ads containing patently false claims were being run in these publications. The Commission has followed a similar strategy in announcing subsequent cases; the press releases have listed the names of networks and publications that have run false ads.¹⁵

If specific media do continue to run ads that they know are facially false and deceptive, then the public should call them to account. If media outlets want to disown *all* responsibility for the ads they air or publish, consumers should be aware of such disavowals, so that consumers can carefully consider whether they should trust the ads they see or read, or whether they should investigate further before purchasing products advertised on a particular station or in a particular magazine.

I hope that the media ultimately will prove that it can effectively regulate itself to rid our airwaves and magazines of patently false claims.¹⁶ I do applaud the media outlets that have used the Commission's Red Flag Guidance to screen out patently false claims, and I encourage all media outlets to do the same.

B. Food Advertising to Children

Unfortunately, the obesity health crisis is not limited to adults. Too many children today also suffer from obesity. There are many possible causes for children's obesity, but the most

important thing that all of us (*i.e.*, educators, parents, marketers, advertisers, the media, and the government) can do is to search for effective solutions to this problem. Accordingly, the FTC and the Department of Health and Human Services (“HHS”) jointly sponsored a workshop this summer that examined marketing, se

At the FTC/HHS workshop, the Grocery Manufacturers of America announced new recommendations to improve upon the important work being done by CARU, including:

- ! expanding CARU's staff and external advisory boards;
- ! enhancing the existing mechanism for pre-review of advertising, in order to prevent advertising that is not consistent with CARU's guidelines from ever reaching the marketplace; and
- ! expanding the scope of CARU's guidelines to:
 - address advergames;
 - prohibit paid product placements on children's TV programming; and
 - ensure that third party licensed characters in advertising are used appropriately.²⁵

Some marketers have heeded the call of Senator Harkin and others. These marketers have begun to take self-regulatory measures, adopting voluntary advertising restrictions such as:

- ! not advertising food products to children under the age of 6;²⁶
- ! not advertising less healthy food choices to children under the age of 12;²⁷ and
- ! not advertising less healthy food choices in schools.²⁸

Of course, advertising alone cannot solve the problem of childhood obesity. Other initiatives discussed by panelists at the workshop included changing the nutrition profile of popular child-friendly products, as well as improving the quality and variety of healthy food options available to children in schools and at restaurants.²⁹

Still, it appears that advertising will continue to exert a major influence on children's food choices. I am encouraged by the efforts of companies that have changed their advertising to promote

healthier eating by children – but further improvements are still needed. If improvements are not made, Congress may decide to legislate in this area. In addition, the prospect of private lawsuits is always lurking.

For the good of children’s health – as well as the corporate health of your clients

that the alcohol industry committed to adhere to a 70 percent adult audience placement standard and to implement post-placement audits.³² The report expressed some concern, however, that “a visible minority of beer ads feature concepts that risk appealing to those under 21 [and that,] [u]nless care is taken, alcohol ads targeted to young legal drinkers also may appeal to those under the legal age.”³³

D. Violent or Explicit Movies, Music and Games

Congress also has asked the Commission to issue a number of reports on whether the motion picture, music recording, and electronic game industries are marketing violent entertainment to children. The latest report was issued last year – and while progress has been made, the Commission found that unfortunately “all three industries continue to advertise violent R-rated movies, explicit-content labeled recordings, and M-rated games in media with large teen audiences.”³⁶

Accordingly, the Commission recommended that “all three industries continue to improve compliance with existing ad placement guidelines and rating information practices, with particular attention to avoiding advertising in venues popular with under-17 audiences, regardless of whether those audiences reach or exceed 35%.”³⁷ The Report further recommended that “all three industries should also consider developing ‘best practices’ to avoid advertising in venues popular with teen audiences, such as recommending that promotions for R-rated films not take place in venues likely to attract significant numbers of young teens or that advertisements not be placed on websites that have a substantial teen audience.”³⁸

1. Movies

With

2. Music

The music industry has fared much worse. The Commission's review of ad placements for parental advisory-labeled music "showed that the music industry has substantially curtailed advertising in print media popular with teens but continues to place ads on television shows with substantial teen audiences, primarily on cable music channels."⁴² Moreover, the music industry's "compliance with labeling requirements for product packaging has improved only slightly since September 2000."⁴³ Eighty-three percent of the teenaged shoppers who participated in the FTC staff's undercover survey were able to purchase recordings labeled with "explicit content."⁴⁴

3. Electronic Games

Let me turn to electronic games and the Commission's report. We found "some instances of marketing of Teen-rated video games in media popular with a pre-teen audience."⁴⁵ On a positive note, ratings information was prominently displayed in advertising and on product packaging.⁴⁶ The report did note, however, some areas where improvement was needed, such as including content descriptors in television advertising and on the front of product packaging.⁴⁷ Moreover, staff's mystery shopper survey revealed that 69 percent of unaccompanied young teen shoppers were able to buy M-rated games, although the survey did document some progress by electronic game retailers in limiting these sales.⁴⁸

Ratings are only as good as the information upon which they are based. Thus, ratings boards must be provided with full and accurate information before a rating is assigned to a product. Recently, for example, the Entertainment Software Ratings Board ("ESRB") revised the rating for the electronic game, "Grand Theft Auto: San Andreas," from ("M") Mature to ("AO") Adults Only.⁴⁹ In a press release, ESRB indicated that "sexually explicit material exists in a fully rendered,

unmodified form on the final discs of all three platform versions of the game,” although the manufacturer “stated that [such material] was never intended to be made accessible.”⁵⁰ The manufacturer, Take-Two Interactive Software, announced in July that FTC staff is “conducting an inquiry into advertising claims made for Grand Theft Auto: San Andreas.”⁵¹ Of course, I cannot comment on that investigation. I will note that three complaints seeking class action status also have been filed against Take-Two, and the company also has disclosed that it has received requests “for documents and information relating to the game” from the Connecticut and North Carolina State Attorneys General.⁵²

ESRB has also stated that it “will now require all game publishers to submit any pertinent content shipped in final product even if is not intended to ever be accessed during game play.”⁵³ Otherwise, it must be removed from the final disc.⁵⁴ ESRB also has “call[ed] on the computer and video game industry to proactively protect their games from illegal modifications by third parties, particularly when they serve to undermine the accuracy

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For those of you who use e-mail marketing campaigns, I remind you that the CAN-SPAM Act has certain requirements you must follow, such as including an opt-out method in your email and identifying any commercial emails as advertisements.⁵⁷ FTC staff issued a report this year on Spyware and Adware after we completed our workshop. The report noted that “adware aptly illustrates the challenges associated with developing a workable definition of spyware” because some types of adware monitor computer use while other types just serve advertising messages to users.⁵⁸ It may be tempting for some of you to use some form of adware. However, if you choose to use it, ask yourself whether the adware is fully, adequately, clearly, and conspicuously disclosed, as well as whether consumers have clearly consented to having any adware programs installed or run on their computers.⁵⁹ The Commission recently settled an action where such consent from consumers was not obtained.⁶⁰

V. CONCLUSION

I’d like to end by evoking a movie analogy. In *Jerry Maguire*, Tom Cruise says to Cuba Gooding, “Help me help you. Help *me* help *you*.” If the advertising industry regulates itself effectively, you will help *us* (at the FTC) to help *you*.

I know that many of you here today may feel pressure to focus on a goal highlighted by another quote from that movie – “Show me the money.” But let me leave you with one final thought: I believe that a company’s *long-run* financial incentives are entirely consistent with effective self-regulation.

If industry does more to demonstrate that self-regulation can rid the marketplace of deceptive and misleading advertising, there will be less need for government intervention and enforcement, which otherwise would add an additional layer of costs.

Even more importantly, better self-regulation will lead consumers to develop greater confidence in your advertising and your products themselves, which ultimately will lead to greater profits for legitimate marketers. When consumers make purchasing decisions, they want to trust advertisers and rs.advertit 94f

1. See FTC POLICY STATEMENT REGARDING ADVERTISING SUBSTANTIATION, *Appended to Thompson Medical*

<http://www.ftc.gov/opa/2005/07/xenadrine.htm>. and Press Release, *NAD Refers Advertising by Cytodyne to the FTC* (Mar. 10, 2004), available at <http://www.nadreview.org/> (Newsroom) (“Cytodyne declined to participate in [the NAD’s] inquiry, informing N

that there was a significant decline in the incidence of Red Flag weight-loss claims in the television, radio, and print advertisements included in the survey. FTC STAFF REPORT, 2004 WEIGHT-LOSS ADVERTISING SURVEY (Apr. 2005), *available at* <http://www.ftc.gov/opa/2005/04/weightlosssurvey.htm>.

17.

25. *Id.* at 128-30 (presentation of C. Manly Molpus, President and CEO, Grocery Manufacturers of America). Other recommendations included greater public access to CARU (including establishing a toll-free consumer response line and website and responding to consumers directly) and greater transparency (including making a summary of CARU's regulatory activities available to the public on the CARU website).
26. Kraft, Comment # 516960-00038 submitted to CHILDHOOD OBESITY WORKSHOP, available at <http://www.ftc.gov/os/comments/FoodMarketingtoKids/index.htm> (noting that "Kraft has a longstanding policy of not advertising in TV, radio and print media that primarily reaches children under six").
27. See Stephanie Thompson, *Food Fight Breaks Out*, ADVERTISING AGE, Jan. 17, 2005, at 1.
28. See Transcript of CHILDHOOD OBESITY WORKSHOP for July 14, 2005 at 151 (representative from the Coca-Cola company stated that they do not sell carbonated soft drinks in elementary schools and over half of the beverages sold in middle and high schools are zero-calorie and non-carbonated beverages) and at 215-16 (representative from PepsiCo stated that they are now recommending "100 percent Smart Spot products in elementary [schools] and . . . a majority of Smart Spot products in other schools").
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36. FTC, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FOURTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES: A REPORT TO CONGRESS (July 2004) at 28, *available at* <http://www.ftc.gov/os/2004/07/040708kidsviolencerpt.pdf>.
37. *Id.*
38. *Id.*
39. *Id.* at *ii.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at *iii.*
46. *Id.*
47. *Id.*
48. *Id.*
49. The ESRB is a self-regulatory body for the interactive entertainment software industry established in 1994 by the Entertainment Software Association to provide ratings for computer and video games. *See* <http://esrb.org/about.asp>.
50. Press Release, *ESRB concludes investigation into Grand Theft Auto: San Andreas; Revokes M (Mature) Rating* (July 20, 2005) at http://www.esrb.org/about_updates.asp#7-20-05.
51. Press Release, *Take-Two Interactive Software, Inc. Announces Federal Trade Commission Inquiry* (July 26, 2005) at <http://ir.take2games.com/ReleaseDetail.cfm?ReleaseID=169679>
52. *Consumer Electronics Daily* (Sept. 13, 2005) (stating that Take-Two revealed the suits and investigations in a 10-Q SEC filing).
53. “*ESRB concludes investigation,*” *supra*, n. 50.

54. *Id.*
55. *Id.*
56. For more information on ratings, see the *Entertainment Ratings Guide*, available at <http://www.ftc.gov/bcp/online/edcams/ratings/ratings.htm> and *Video Games: Reading the Ratings on the Games People Play*, available at <http://www.ftc.gov/bcp/online/pubs/alerts/videoalrt.htm>. Consumers may file complaints about media violence at <http://www.ftc.gov/bcp/online/edcams/ratings/complaint.htm>
57. CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY AND MARKETING ACT OF 2003 (CAN-SPAM Act), Public Law 108-187, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ187.108.pdf. See also *Facts for Business: The CAN-SPAM Act: Requirements for Commercial Emailers*, available at <http://www.ftc.gov/bcp/online/pubs/buspubs/canspam.htm>.
58. FTC STAFF REPORT, SPYWARE WORKSHOP: MONITORING SOFTWARE ON YOUR PERSONAL COMPUTER: SPYWARE, ADWARE, AND OTHER SOFTWARE (March 2005) at 3, available at <http://www.ftc.gov/os/2005/03/050307spywarerpt.pdf>.
59. See *Dot Com Disclosures: Information About Online Advertising*, available at <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.pdf>; FTC News Release, *Advertising.com Settles FTC Adware Charges* (Aug. 2005), available at <http://www.ftc.gov/opa/2005/08/spyblast.htm>.
60. *Advertising.com Settles FTC Adware Charges*, n. 59.