

PREPARED STATEMENT

of

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Hearing on

Advertising Trends and Consumer Protection

Before the

**United States Senate Committee on
Commerce, Science, & Transportation**

**Subcommittee on
Consumer Protection, Product Safety,
and Insurance**

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Thank you for inviting me to appear before you today.

I appreciate the opportunity to describe for the Subcommittee the ongoing work of the advertising industry's system of self-regulation.

Advertising self-regulation, as described below, monitors and reviews national advertising in all media to foster high standards of truth and accuracy. In addition to programs requiring all advertising to be truthful and accurate, the self-regulatory system maintains special programs to address claims made in electronic direct-response advertising and in the advertising of dietary supplements; has a unit that focuses exclusively on children's advertising, and supports a new program that addresses concerns about food advertising and childhood obesity.

For almost 40 years, and with the support of the advertising industry, these programs have provided expert, impartial, transparent and accountable oversight of national advertising. The process is independent and expert, relying on skilled professional staff to examine advertising claims and substantiation; expeditious, with decisions normally made in 60 to 90 business days; and efficient, resolving cases at a fraction of the time and cost of private litigation or government investigations.

The decisions reached by the investigative units of the self-regulatory system provide a comprehensive body of guidance that advertisers regularly consult in constructing advertising claims. Despite the fact that decisions often require that advertisers modify or discontinue claims, well over 90% of participants voluntarily comply with our decisions.

In short, the system is a highly effective means of fostering truth and accuracy in advertising. It has frequently been cited by the Federal Trade Commission as a model of effective industry self-regulation and the principles underlying the system's success can be looked to in deploying self-regulatory efforts in other areas. We are, for example, using this model to build an accountability program for the behavioral advertising self-regulatory principles announced earlier this month.¹

National Advertising Review Council

The advertising industry's self-regulatory system was created in 1971 when three leading advertising trade organizations – the American Advertising Federation (AAF), American Association of Advertising Agencies (AAAA) and Association of National Advertisers (ANA) – together with the Council of Better Business Bureaus (CBBB), announced a new alliance to promote truthful and accurate advertising. That alliance, the National Advertising Review Council (NARC), sets policies and procedures for advertising industry self-regulation.

In addition to the founding partners, the NARC Board now includes the chief executives of the Direct Marketing Association, Electronic Retailing Association and Interactive Advertising Bureau, giving NARC significant reach throughout the advertising and marketing community.

¹***Principles on Collection and Use of Behavioral Advertising Data Released***
<http://www.bbb.org/us/behavioral-advertising-principles/>

Administration by the Council of Better Business Bureaus

To ensure the impartiality and independence of the self-regulatory process, the system is administered by the CBBB. The CBBB is the network hub of the 125-member Better Business Bureau system in the United States and Canada, which works to promote trust in the marketplace.

NARC Self-Regulation Programs

The self-regulatory system includes three investigative units, the National Advertising Division of the Council of Better Business Bureaus (NAD), the CBBB's Children's Advertising Review Unit (CARU), and the Electronic Retailing Self-Regulation Program (ERSP). It also maintains the National Advertising Review Board, the appellate unit. In addition, the CBBB provides ongoing oversight and compliance reporting for the NARC-endorsed Children's Food and Beverage Advertising Initiative (CFBAI). As exemplified by these programs, NARC has, throughout its history, adapted its programs to respond to new public and policy concerns.

National Advertising Division

The National Advertising Division of the Council of Better Business Bureaus (NAD) was chartered in 1971 in response to concerns about truth and accuracy in advertising. NAD examines advertising that is national in scope to assure that it is truthful and that claims are fully substantiated. NAD opens cases as result of its own monitoring, and in response to consumer complaints and to challenges filed by companies that question the truth and accuracy of a competitor's advertising claims.

Through its decisions, NAD has provided invaluable guidance on appropriate advertising and advertising claims substantiation in all forms of national media.² NAD attorneys have examined advertising for products as diverse as infant formula, over-the-counter medications, nuclear energy, weight-loss supplements, tires, plastics, consumer electronics, building supplies and products that claim a "green" or environmental benefit.

In 2008, NAD closed 134 cases, including 98 challenges filed by companies to their competitors' advertising claims.

Overall, NAD has produced well over 5,000 decisions on the truthfulness and accuracy of advertising claims, perhaps the nation's largest body of advertising decisions.

The Children's Advertising Review Unit

The CBBB's Children's Advertising Review Unit was created in 1974. CARU sets high standards to assure that advertising directed to children under 12 is not deceptive, unfair or inappropriate for its intended audience. The standards take into account the special vulnerabilities of children, including their inexperience, immaturity,

² **NAD/CARU/NARB Procedures**
<http://www.narcpartners.org/about/procedures.aspx>

susceptibility to being misled or unduly influenced, and their lack of cognitive skills needed to evaluate the credibility of advertising.³

CARU's standards are embodied in principles and guidelines that were adopted in 1975 and have been periodically updated to address changes in the marketing and media landscape. In 1996, for example, CARU added a new section of the guidelines to address concerns about online data collection practices, and, in 2006, the guidelines were comprehensively updated and new provisions were added addressing food advertising, blurring of advertising and editorial content and unfair advertising practices.⁴

In 2008, CARU handled 84 cases. About one-third of these cases focused on provisions of the CARU guidelines governing the collection of personal information on child-directed Websites.

The Electronic Retailing Self-Regulation Program

The Electronic Retailing Self-Regulation Program was developed in 2004 at the request and with the support of the Electronic Retailing Association – which represents retailers selling goods and services online, on television and on radio – to monitor advertising claims made in electronic direct-response marketing, including infomercials, home-shopping channels, Website advertising and email advertising.

Since its founding, ERSP has examined thousands of hours of infomercials and thousand of Websites, and issued more than 200 decisions on the core advertising claims made in direct-response advertising across a broad range of formats, including streaming video and in the virtual world of Second Life.

Dietary-Supplement Advertising Review Program

In 2007, the NAD, with the support of the Council for Responsible Nutrition – an association of manufacturers and suppliers of dietary supplements and their ingredients – expanded its review of advertising for dietary supplements. That program is aimed at assuring that advertising claims for dietary supplements, particularly health claims, are substantiated by scientific evidence. In the past two years, NAD has reviewed advertising for and issued decisions regarding more than 50 separate dietary-supplement products, including Resveratrol, Omega-3 oil, green-tea extract and glucosamine, substantially increasing NAD oversight in this important area.

National Advertising Review Board

The policies and procedures that govern advertising industry self-regulation provide advertisers with an automatic right to appeal NAD or CARU decisions to a review panel of their peers. The procedures allow challengers to request an appeal.

³ *Self-Regulatory Program for Children's Advertising*
<http://www.caru.org/guidelines/guidelines.pdf>

⁴ *New Food, Beverage Initiative to Focus Kids' Ads on Healthy Choices; Revised Guidelines Strengthen CARU's Guidance to Food Advertisers*
<http://www.bbb.org/us/article/672>

These appeals are heard by five-member panels of the National Advertising Review Board (NARB) which is composed of advertisers, advertising agencies and public members, including academics. NARB members are nominated for their stature and experience in their respective fields.

Children's Food and Beverage Advertising Initiative

In 2006, the CBBB worked with its NARC partners and leading food companies to develop the Children's Food and Beverage Advertising Initiative – a program that monitors food advertising to children to assure that participants abide by the terms of their commitments. The NARC-endorsed and CBBB-led initiative currently has 15 participants. Of these, four companies have elected not to engage in advertising primarily directed to children under 12. The other 11 have pledged that 100% of their advertisements to children under 12 in measured media (television, print, radio, and third-party Internet sites) will be better-for-you foods, as defined by nutrition standards based on government or other scientific standards.⁵

Operation of the Self-Regulatory System

Advertising self-regulation is a fast, effective, industry-supported system that acts in the interests of both consumers and the advertising industry. Through monitoring, complaints and competitor-initiated challenges, the system identifies and expeditiously examines potentially misleading or unsubstantiated advertising claims and seeks prompt voluntary correction. Advertisers are required to halt such claims in future advertising and correct all materials, including labels, that display the claims at issue in the self-regulatory review. The self-regulatory system does not impose fines or penalties.

The system is fast and efficient. Our goal is to close each review within 60 business days. The system is transparent. All decisions – regardless of the findings – are publicly reported so that the public and the industry can judge the process.

NAD, CARU and ERSP each have a voluntary compliance rate of 90 percent or better. This is a remarkable record of voluntary compliance and a strong indication of the industry's respect for the self-regulatory process.

Companies that refuse to participate in the process or refuse to comply with recommendations to modify or discontinue advertising claims are publicly identified and the advertising at issue is referred to the appropriate government agency, usually the Federal Trade Commission (FTC).

FTC Support for Self-Regulation

During the nearly 40 years of its existence, the advertising self-regulatory system has received strong support from the FTC.⁶ The FTC also has consistently supported

⁵ ***Changing the Landscape of Food and Beverage Advertising***
http://www.bbb.org/us/storage/16/documents/CFBAI/ChildrenF&BInit_Sept21.pdf

⁶ ***"Truth or Consequences: The FTC Approach to Advertising"***
Remarks of Commissioner Jon Leibowitz at The National Advertising Division Annual Conference – September 24, 2007

Footnote continued, pg. 6

self-regulation by committing to give a priority to examining referrals from the advertising self-regulatory process. Referrals to the FTC of advertisers that refused to participate in the self-regulatory process have resulted in FTC lawsuits and significant monetary penalties.⁷

The FTC's support has been critical to the success of self-regulation. The self-regulatory process has provided benefits to the FTC, in turn. Self-regulation quickly and efficiently resolves many issues that might otherwise come before the agency, thus freeing FTC resources to focus on consumer fraud and other priority issues. In the context of truth and accuracy, self-regulation acts as one important part of a comprehensive system for preventing misleading advertising. That system includes federal enforcement by the FTC, enforcement at the state level by states' attorneys general, private litigation under the Lanham Act, and active pre-screening of advertising by broadcast networks.

Advertising Trends

As the advertising industry's principal self-regulatory body, NARC and the CBBB are positioned to identify trends both in the challenges filed and in the cases that we monitor. In addition, the 125 bureaus of the BBB system review advertising in their geographic areas and seek voluntary correction of misleading claims.

Over the past two years, the leading product categories for NAD's self-regulatory decisions have been food and beverages, dietary supplements, household products, cosmetics, pet products, telecommunications services, consumer electronics.

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"All of us at the FTC appreciate the NAD's advertising review work. It is more important today than it has ever been. ... It really helps to have an alternative procedure that is quick, fair, and well-respected."
<http://www.ftc.gov/speeches/leibowitz/070924bbbremarks.pdf>

The Federal Trade Commission at 100: Into Our Second Century

The Continuing Pursuit of Better Practices: A Report by Federal Trade Commission Chairman William E. Kovacic – January 2009.

"Meaningful self-regulation is an important complement to the Commission's law enforcement efforts – particularly in the area of deceptive marketing practices. For example, the program administered by the National Advertising Division/National Advertising Review Council ("NARC") arm of the Council of Better Business Bureaus ("CBBB") has worked well to obviate the need for Commission action in some instances."
<http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>.

Self-Regulation in the Infomercial Industry:

Deborah Platt Majoras, Chairman, Federal Trade Commission
Before the Electronic Retailers Self-regulatory Program – April 2006
(Footnote No. 3, listing FTC statements in support of self-regulation since 1978.)
<http://www.ftc.gov/speeches/majoras/060503eraspeech.pdf>.

⁷ Court Orders Spammers to Give Up \$3.7 Million

<http://www.ftc.gov/opa/2009/07/spear.shtm>;

Oregano Supplement Marketers Agree to Pay \$2.5 Million to Settle FTC Charges for False Advertising Claims

<http://www.ftc.gov/opa/2008/08/naherb.shtm>.

By far the most common issues that we examine are whether claims about the efficacy or performance of a product are adequately substantiated, whether the advertised product is superior to its competition and whether material information, necessary to avoid misleading consumers, is clearly and adequately communicated.

NAD has experienced an increase in cases involving green marketing claims, value claims (savings claims from using a particular product or retailer), health claims and claims for products targeted at the nation's aging population. It is important to remember that many cases are competitive challenges. An increasing number of challenges within an industry signals that members of an industry are moving proactively to police themselves, a healthy trend.

The ERSP program, which monitors electronic direct-response advertising in a variety of media, reports growth in weight-loss claims, efficacy claims for health products, advertising claims that state a product's benefits are "clinically proven," claims regarding "credit rescue" and work-at-home opportunities and "affiliate marketing programs" in which deceptive claims are made at multiple and seemingly unrelated Websites. Marketing for acai berry products is a recent example of this.

All of our self-regulatory programs are working to examine advertising in a new-media context. Recent cases address claims made in advertising videos and "viral" videos, posted at YouTube, advertising claims made in virtual worlds, such as Second Life, and through objective claims in product placements on television.⁸ In addition, despite longstanding prohibitions, the self-regulatory system continues to see examples of paid advertising presented in formats that can be confused as editorial content and the self-regulatory units have issued decisions addressing such "blurring" of advertising and editorial content.⁹

BBB Advertising Reviews

Many local BBBs maintain active advertising monitoring programs in their communities under the BBB Code of Advertising.¹⁰ BBBs handle thousands of advertising review cases, including pricing claims, inadequate disclosures and qualifications, superiority claims, rebates and warranty and guarantee claims.

⁸ **NAD Case #4934, Cardo Systems**
www.narcpartners.org;

ERSP Photoblocker Spray
www.narcpartners.org;

NAD Case #4611, Perfect Match
www.narcpartners.org.

⁹ **NAD Case #5038, PatentHEALTH**
www.narcpartners.org;

NAD Case #4677, Renaissance Health Publishing
www.narcpartners.org;

CARU Case #4525, Activision
www.narcpartners.org.

¹⁰ **BBB Code of advertising**
<http://www.bbb.org/us/code-of-advertising>.

BBBs also work to resolve complaints about business practices and are in a unique position to identify potential scams – both locally and nationally – and warn consumers about fraud. BBB scam alerts include alerts related to acai berry weight-loss products, Twitter-based money-making schemes, “robocalls” that promise easy credit repair or rescue and scams related to swine-flu fears.¹¹

BBBs report geographic variations in the types advertising issues they see. The Better Business Bureau of Utah, for example, reports a high number of negative option complaints – low-cost trial offers that are accompanied by inadequately disclosed monthly billing commitments at a much higher price, deceptive rebate offers and questionable claims for nutritional products. The Better Business Bureau of Metropolitan New York reports a similar increase in “free trial” offers followed by surprising monthly bills, along with advance-fee mortgages and concern about misleading advertising for apartments. Recently, the New York BBB worked with the New York State Attorney General to identify and stop seven electronic retailers who allegedly advertised low prices for consumer electronics over the Internet and then would not ship products unless consumers ordered more expensive goods – classic bait and switch practices transferred to the Internet.¹²

Conclusion

The advertising industry has a strong, longstanding commitment to self-regulation as a tool to foster high standards of truth and accuracy in national advertising. These CBBB-administered programs provide an expert, fast and effective mechanism to address concerns about a wide range of advertising claims, and are supplemented by the work of BBBs to promote truthful advertising in their communities.

The system represents a substantial benefit to consumers and it has earned the support of the advertising industry and the FTC.

We work every day to assure, through the quality of our decisions and clarity of our guidance, that we continue to deserve that support.

¹¹ **Weight-loss Berry Claiming Oprah Endorsement Makes Wallets Slim and Consumers Angry, Warns BBB**
<http://www.bbb.org/us/BBB-Press-Releases>.

BBB Warns Against Twitter Money-Making Schemes,
<http://www.bbb.org/us/BBB-Press-Releases>;

BBB, Schumer Warn Consumers of Robocalls Promising to Lower Their Credit Card Interest Rate
<http://www.bbb.org/us/BBB-Press-Releases>;

BBB Warns Against Swine Flu Scams: Scammers are creating their own epidemic of spam e-mails
<http://www.bbb.org/us/BBB-Press-Releases>.

¹² **AG Reaches Agreement with Seven Electronics Companies in NY, BBB to Administer Restitution Fund**
<http://www.newyork.bbb.org/article/ag-reaches-agreement-with-seven-electronics-companies-in-ny-bbb-to-adminis-11186>.