

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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In the Matter of Advertising of Weight :
Loss Products Workshop - :
Comment, PO24527 :
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**COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION TO THE
FEDERAL TRADE COMMISSION’S WORKSHOP AND STAFF REPORT ON
ADVERTISING OF WEIGHT-LOSS PRODUCTS**

I. Introduction

The Electronic Retailing Association (“ERA”) is the leading trade association representing the electronic retailing industry. The ERA has over 450 member organizations, encompassing a wide range of entities such as advertising agencies, direct response marketers, telemarketers, Internet and brick and mortar retailers, fulfillment service providers, and television shopping channels, including such well known names as America Online, HSN and QVC.

The ERA’s mission is to foster the use of various forms of electronic media -- television, Internet, telephone and radio -- to promote goods and services to consumers. Many ERA members market or are involved in the advertising or sale of weight loss products. Throughout its history, the ERA has been committed to ensuring that its members adhere to the highest ethical business standards in connection with the marketing of their goods and services through its own Member Code of Ethics and Marketing Guidelines.

The ERA shares the Commission’s concerns about improper advertising and marketing of weight loss products. The ERA believes that constructive enforcement of existing laws and regulations by the Commission, strong industry self-regulation and

effective consumer education are the best approaches to combat improper marketing practices. Any action that would discourage or have a chilling effect on the truthful marketing of legitimate weight loss products would be harmful not only to ERA and other industry members, but to consumers as well.

The ERA is pleased to have been invited to participate in the Commission's Workshop in November, 2002. We look forward to engaging in a constructive dialogue with the Commission and other workshop participants. The ERA is submitting these preliminary comments to provide the Commission with some insight into ERA's views concerning the various issues and suggestions raised in the Commission's Staff Report, "Weight Loss Advertising - An Analysis of Current Trends," dated September 17, 2002 (the "Weight Loss Report"). The ERA plans to submit more detailed comments after the Workshop so that it can more constructively address the issues raised during the Workshop.

II. Discussion of ERA Position

The ERA fully supports the Commission's desire to suppress fraudulent and unscrupulous marketing of weight loss products. Such activities undermine consumer confidence and make it difficult for legitimate marketers of effective weight loss products to compete fairly in the marketplace.

Existing statutes, regulations and guidance applicable to the advertising of weight loss products include the Federal Trade Commission Act, the Dietary Supplement and Health Education Act, and regulations and agency guidance promulgated thereunder. The ERA believes that these standards already provide (a) sufficient guidance for advertisers about identifying claims and the requirements for substantiation, (b) adequate deterrence for responsible marketers, and (c) the necessary framework for prosecuting any advertiser that makes false, misleading or deceptive advertising claims about its products or services.

The ERA supports the continued case-by-case review and prosecution of advertising claims as the proper regulatory approach. This approach enables the Commission to be flexible and appropriate in measuring the truthfulness or “net impression” of each advertisement in context. The Staff in the Weight Loss Report expresses concern about whether the existing regulatory framework and its enforcement actions have been sufficient in light of the proliferation of misleading advertisements in the weight loss industry. The Commission has suggested in its Weight Loss Report that consideration be given to (1) gaining expert consensus that certain claims are presumptively false or unsubstantiated; (2) encouraging the advertising media to voluntarily use this list of presumptively false claims to screen advertisements; and (3) explore other alternatives to enforcement by traditional case-by-case adjudication.

The ERA is deeply concerned that any list of presumptively false or unsubstantiated claims will amount to an effective ban on the use of such claims. Such an approach is highly problematic for several reasons.

First, weight loss and nutritional science are rarely static. Research on new dietary ingredients and other products is continually evolving. Thus, claims which may be thought to be presumptively false today may become fully acceptable tomorrow. One need only look at the change in scientific consensus over whether certain types of fats are “good” for you to see that today’s apparent constraints can be discarded theory tomorrow. Scientific evidence supporting the relationships between weight loss strategies (including exercise programs, diet regimes and dietary supplements) and both general and specific health benefits is increasing rapidly. Creating a list of presumptively false claims based solely on today’s science will choke the flow of new products and information to consumers and impede the introduction

and marketing of new and efficacious products. New products and new claims should not be subject to prior advertising restraints, since they may soon be adequately supported by newly developed scientific evidence.

Second, a list of presumptively invalid claims does not take into account qualifying language, disclaimers, and the overall net impression of an advertisement. Such an approach runs counter to the principle of advertising law that the truthfulness and accuracy of advertising claims be viewed in the context in which the advertising is presented. For example, weight-loss programs based on a low-calorie diet combined with increased exercise could substantiate a claim that it would “cause a substantial amount of weight-loss for all users” (Claim 6). These types of programs are also likely to result in “permanent weight-loss” (Claim 7) for any consumer who incorporates the program guidelines into his or her lifestyle on an ongoing basis. An outright ban on or a presumption of falsity or lack of substantiation about these types of claims, without due regard for context, would therefore be overly broad and preclude true and accurate claims.

Furthermore, there is a real danger that smaller and even some larger media companies may overreact to any list of presumptively false or unsubstantiated claims. Many cable system operators, newspaper publishers and other media companies will not have the resources or expertise to analyze the “net impression” of weight loss advertising, and will reject nondeceptive advertisements because they overlook qualifications and disclaimers that appropriately limit the breadth of weight loss advertising claims.

The media also will not have the resources and expertise to conduct the type of technical and scientific review required to properly evaluate the adequacy of substantiation for weight loss claims. Clinical studies and other scientific materials supporting these claims

can be highly technical and complex. Imposing additional responsibility on the media for ensuring the truthfulness or accuracy of weight loss ads they carry will have a chilling effect on the media's willingness to carry such advertising at all. Further, such an approach would go beyond existing case law. To date, courts have held the media liable for advertising submitted for broadcast or publication only in extreme cases where there was a direct showing that the medium knowingly or willingly published false advertising.

The chilling effect of an official list of presumptively invalid claims also raises serious First Amendment issues. Government regulation of speech, including truthful commercial speech, must satisfy a high burden. Even in the area of health and safety, the Supreme Court has held the government to this high burden. For instance, the Supreme Court found no basis for a virtual ban on advertising the price of alcohol.¹

Recently, the courts have increasingly found that government attempts to regulate commercial speech in the health area violate the First Amendment.² The courts have held that regulating speech, especially prior to making a specific claim, should be the government's last resort. In the dietary supplement labeling context, the courts have expressed a strong preference for qualified language and disclaimers over prohibiting even misleading speech.³

The ERA believes that in adopting any policy which may effectively compel media to establish a clearance process, the Commission should consider the direct and indirect costs of such a regime and the likelihood that many media will simply elect not to take any weight-loss advertising. The cost of a clearance process and the fear of liability for carrying any

¹ See *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

² See, e.g., *Thompson v. Western States Medical Center*, 122 S. Ct. 1497 (2002).

³ See, e.g., *Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999).

potentially problematic advertisements may outweigh the benefit of accepting these ads. As a result, many media may decline to carry such ads. This chilling effect on the media would substantially diminish the number of available and affordable outlets for marketers of weight-loss products, thereby entrenching the dominant players and increasing the barriers to entry, a result which the ERA believes should be avoided.

III. CONCLUSION

ERA believes that the Commission's long-standing approach of case-by-case review of substantiation documents and claims to examine potentially deceptive advertising claims for weight loss products is fair and appropriate. The ERA supports this approach because it is flexible, allows innovation, and assists in focusing on the overall "net impression" of an advertisement, as opposed to examining one claim in isolation.⁴

The ERA recommends that the Commission continue its rigorous enforcement of existing laws and regulations in conformance with this case by case approach, with special focus on targeting the most egregious violators.

The ERA agrees that additional efforts are necessary. ERA firmly believes that industry self regulation, coupled with consumer education, will fully and appropriately further the goals of the Commission without unduly encroaching on constitutionally protected free speech.

Throughout its history, the ERA has been committed to ensuring that its members adhere to the highest ethical business standards in connection with the marketing of their goods and services. Since 1996, the ERA has had a Member Code of Ethics pursuant to

⁴ *See id.*

which its members pledge to be honest and fair in all dealings with their customers and to establish and maintain a fair and equitable system for the handling of customer complaints.

The ERA also has promulgated Marketing Guidelines which apply to all radio and television advertisements produced or disseminated by ERA members. These Guidelines contain substantiation and disclosure requirements designed to ensure that all statements made in such advertisements are truthful and not misleading. The continued commitment to these standards and guidelines should support the effort to improve the quality of industry advertising.

Although the standards contained in ERA's existing Guidelines are applicable to weight loss advertising, the ERA would consider the creation of guidelines specifically regarding weight loss advertising, and would be happy to discuss this possibility with the Staff.

One of the ERA's goals for the coming year is the enhancement of its self-regulatory process for dealing with the advertising of both members and non-members that do not conform to its Guidelines. The ERA would appreciate an opportunity to receive input from the Commission about how its self-regulatory program can be enhanced and made most effective to reduce false and unsubstantiated advertising in the marketplace.

The ERA also believes that effective consumer education is one of the strongest weapons the Commission can use to combat deceptive and misleading advertising in the marketplace. The ERA would welcome the opportunity to partner with the Commission in developing an appropriate consumer education program.

Thus, the ERA supports an active partnership between the Commission and industry to emphasize enforcement, self-regulation and consumer education. In this manner, the

truthful advertising of legitimate and effective weight loss products will be allowed to continue, while consumers remain informed about and protected against unscrupulous marketing claims.

Respectfully submitted:

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