



Federal Trade Commission

Self Regulatory Organizations and the FTC

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Council of Better Business Bureaus

I. Introduction

Thank you. I am delighted to appear here today at the semi-annual meeting of the Council of Better Business Bureaus (“BBB” or “Council”). The BBB has long been an important advocate for American consumers and an ally of the Federal Trade Commission in our efforts to fight fraud and deception in the marketplace. Indeed, the BBB is one of the most well-known and trusted consumer advocates in our nation, as countless times per day, persons can be heard telling a family member reassuringly, “I will call the BBB,” or telling an unscrupulous marketer threateningly, “I will call the BBB!”

In his invitation to me, Ken Hunter observed that the BBB’s self-regulation mechanisms, including your dispute resolution and advertising review programs, closely parallel the consumer protection mission of the FTC. A glance at our many areas of collaboration confirms this view. Tips from local BBBs about troubling complaint patterns have been instrumental in helping the

¹The speech was prepared with the assistance of Maureen K. Ohlhausen, Acting Director of the Office of Policy Planning; Paul Pautler, Deputy Director for Consumer Protection of the Bureau of Economics; Lee Peeler, Deputy Director of the Bureau of Consumer Protection; and Rielle Montague, an attorney in the Commission's Division of Advertising Practices. The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or of any other individual Commissioner.

FTC's law enforcement staff quickly identify potential fraud cases. Local BBB offices have contributed more than 70,000 complaints to the FTC's Consumer Sentinel Fraud Database, which is used not only by the FTC but also by some 1,200 other law enforcement agencies, including Canadian and Australian agencies. During the course of investigations, our staff are frequently in contact with local BBBs, which provide critical investigative assistance. In addition, local BBBs are an important distributor of our consumer and business education materials, and our regional office staff frequently participate in BBB-sponsored education programs. On behalf of the FTC, I thank you for being a strong partner in our mission of protecting consumers, and I ask you to continue maintaining the same high level of collaboration. As I told our staff in an address to them last month, we can "take nothing for granted, save the need to improve."² New challenges to consumers mandate that we get as much as we can from our resources, making the best use of every tool we have and continuing to partner with other agencies and organizations that share our commitment.

Among the tools in the toolbox are self-regulation programs. Self-regulation is a broad concept that includes any attempt by an industry to moderate its conduct with the intent of improving marketplace behavior for the ultimate benefit of consumers. The universe of self-regulatory organizations includes industry-wide or economy-wide private groups that provide, *inter alia*, certification, product information, complaint resolution, quality assurance, industrial standards, product compatibility standards, professional conduct standards, and complaint resolution. Implemented properly, each can provide efficiencies and other benefits to consumers

²See FTC Chairman Deborah Platt Majoras, State of the Commission, Address Before the Federal Trade Commission (Mar. 28, 2005), *available at* <http://www.ftc.gov/speeches/majoras/050328stateofftc.pdf>.

that otherwise likely would not be possible without some form of government intervention.

Self-regulation has its fair share of skeptics. Ours is a nation of laws, and many see solutions to consumer problems effectively provided only through legislation and government regulation. Others cannot accept that industry participants will ever find it in their interest to comply with self-regulatory standards and presume instead that they will, if anything, make only a show of complying to avoid government intervention. In fact, however, many self-regulatory schemes have been effective precisely because the self-regulated have recognized that complying has been in their interest. Further, what the critics may fail to acknowledge is that government regulation and enforcement also have limitations, which must be weighed against their benefits. The FTC has recognized the benefits that self-regulation can bring to the area of consumer protection, as well as the limitations. Today, I would like to expand on the topic of self-regulation and self-regulatory organizations, to discuss how such organizations may benefit consumers and business, and to describe some self-regulatory schemes from which such benefits have been derived.

II. Self-regulation

The overwhelming majority of consumer transactions are satisfactory experiences in which the purchaser receives the product promised by the seller, and the product performs satisfactorily. Competition presses most sellers to provide truthful, useful information about their products and to fulfill promises concerning price, quality, and other terms of sale. In a competitive market, consumers can simply choose not to patronize businesses that do not make good on their promises, which forces the seller either to satisfy consumers or risk going out of business. This type of market discipline is especially effective for sellers of frequently

purchased products, the qualities of which purchasers can readily evaluate.³

Some products, however, are purchased infrequently or have attributes that are harder for a consumer to verify, which means that market discipline could be less effective. In these cases, self-regulatory initiatives may improve the market process by providing consumers with additional information that they cannot easily obtain on their own. Self-regulation also can benefit reputable sellers, who not only lose sales to dishonest competitors but also suffer when such behavior makes consumers distrustful and less willing to participate in the market.

There are hundreds, if not thousands, of trade groups and self-regulatory organizations that provide, to varying degrees, various functions that can be most efficiently and lawfully provided by some level of coordinated action. These entities can help markets work more efficiently if they reduce transaction costs or production costs, increase interchangeability or compatibility, reduce consumer risk, or set ground rules upon which competition can flourish.

Some trade groups exhort members to higher standards. Membership in such organizations may provide credibility for new firms, and the organization may devise industry-wide rating systems or standards that provide product or behavioral advantages for the industry as a whole.

Some organizations act as “third-party” certifiers of products or firm behavior. Provided such organizations have sufficient independence from those they certify, they can provide a great deal of assurance to consumers that the firms or their products have passed a minimal standard of

³Of course, the FTC and the BBB well know that some sellers base their business plans on deception and may not expect to satisfy a set of repeat customers. They choose, instead, to engage in deceptive marketing of a product for as long as possible until enforcement officials catch up with them. We have an active and vigorous program devoted to detecting and prosecuting these companies.

performance. The BBB and other organizations provide this valuable service for both on-line and bricks and mortar firms.

Industry standard setting, a form of self-regulation, can help consumers and businesses by setting a level of quality and technical specifications that allows uniform and low-cost production, lower-cost product development, and enhanced compatibility. Self-regulation also may benefit consumers and businesses by providing a cheaper form of complaint resolution than formal arbitration or litigation.

A form of quasi-self-regulation is provided by consumer-supported third-party certifiers and information providers. These organizations are not really self-regulatory, but they are not governmental either. Rather, they can fill gaps between the two.⁴

III. Evaluating Self-Regulation

Because self-regulation likely has been instituted in response to a market failure or need, the most plausible alternative is government regulation that may have been adopted had a self-regulatory regime not been put into place.⁵ Thus, when evaluating self-regulation as an option, it is necessary to compare the advantages and disadvantages of self-regulation to government regulation.

Advantages

⁴Two well-known examples of such organizations are the Good Housekeeping Institute and Consumers Union, described *infra* at 16.

⁵A recent Oxford University study indicated that much self-regulation comes about as a result of cataclysmic events that would have resulted in direct governmental regulation if not for the advent of an effective self-regulatory system. PROGRAMME IN COMPARATIVE MEDIA LAW & POLICY, OXFORD UNIVERSITY CENTRE FOR SOCIO-LEGAL STUDIES, SELF-REGULATION OF DIGITAL MEDIA CONVERGING ON THE INTERNET: INDUSTRY CODES OF CONDUCT IN SECTORAL ANALYSIS (2004), available at <http://pcmlp.socleg.ox.ac.uk/IAPCODEfinal.pdf>.

Well-constructed industry self-regulatory efforts may offer several advantages over government regulation. First, self-regulation is likely to be more prompt, flexible, and responsive than traditional statutes and regulations. Self-regulatory organizations often have the ability to move faster and in more directions than traditional government regulators. They may or sometimes can adapt to market changes and consumer needs more readily than can major regulatory systems, which generally only get reconfigured, if at all, years after initial implementation. Self-regulatory organizations also may be better able to narrowly tailor their reach to a particular category of businesses. Government regulation, conversely, cannot always adapt as easily to focus on issues affecting small groups of similarly situated firms or the customers of those specialized firms; rather, it tends to paint with a broader brush.

If self-regulatory organizations have obtained the support and participation of member firms, the regulatory outcomes will likely be well-attuned to the realities of the market. They can be conceived with the accumulated judgement and hands-on experience of the industry members who are likely able to devise workable rules in areas in which it might be difficult for the government to draw bright lines. That can result in restrictions that are at once more effective and less burdensome for firms. And often the rules or guidelines developed will represent a broad cross-section of industry views, because participants will not want to risk significant refusals to participate, which would undermine the entire scheme.

Compliance can be just as high under a coordinated self-regulatory system as under command and control regulation, because the member firms participate in the construction of the system and will have “bought into” the regulatory process. Further, the “sticks” of public recognition for non-compliance and of government intervention if the self-regulation fails can be

quite effective. Self-regulatory dispute resolution might also be less adversarial and more efficient than more formal legal or regulatory procedures for both disputes between member firms and between consumers and firms. And if the process is sufficiently objective and transparent, it permits the public to judge the integrity of the review system and increases confidence in self-regulation.

Another advantage of self-regulation is that the regulatory cost burden falls on the industry participants rather than on the general taxpayer. That burden allocation is appropriate given that the industry members likely have the biggest stake in the outcome.⁶

With respect to certain advertising practices, self-regulation may be the only available regulatory mechanism. Many forms of government intervention, such as those restricting truthful claims aimed at adults, would be severely limited by the First Amendment. With respect to certain advertising practices, self-regulation can be the preferable regulatory mechanism. This is because many forms of government intervention, such as those restricting truthful claims aimed at adults, raise serious First Amendment concerns that restrict the scope of permissible government regulation.

Limitations

⁶Of course, the concept of “regulatory capture” can be a concern. As described by Richard Posner, regulation “is a process by which interest groups seek to promote their private interests. Over time, regulatory agencies come to be dominated by the industry groups regulated.” Richard A. Posner, *Theories of Economic Regulation*, 5 THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE 335 (1974). Thus, if industry participants provide 100% of the funding to a particular self-regulatory organization, many economists would posit that the organization would simply become about the “self” of the industry without the “regulatory” function for which it was ostensibly created.

Self-regulation, of course, has limitations. If participation in the self-regulatory body is voluntary, as it most often is, then those who truly object to the restrictions can avoid them entirely. Indeed, if the self-regulatory structure is fairly coercive, in the sense that the rules conflict with the short-run incentives of the individual firms, then compliance may be weak. Although members of the organization who comply can tout their membership and thus signal to consumers that they are better firms with whom to do business, they, of course, have no enforcement power.

Even when a viable self-regulatory system may be in the long-run self-interest of industry members as a group, it may at particular times be inconsistent with the short-run objectives of any one member firm. As a result, the self-regulator may have mixed motives that are difficult to reconcile. Commercial motives of individual members may diverge from those of the group and from those of the self-regulator, who wants to provide viable regulatory services for firms and consumers, while maximizing membership in the organization. This problem of mixed motives is not uncommon in business or regulatory settings, and it can often be overcome by maintaining maximum transparency in the organization's processes and by occasionally auditing the self-regulator.

Some self-regulatory mechanisms may lack understandable or workable standards. Others may be under-funded. To be credible to consumers and to serve as an alternative to government regulation, the self-regulatory organization must have sufficient resources to do the job. It must be sufficiently independent of the member firms' individual lobbying and financial influence to objectively measure member firm performance and impose sanctions for non-compliance. This also means they must be transparent enough to garner public trust.

Finally, putting on my antitrust hat, self-regulatory procedures must not be used inappropriately to weaken competition and create barriers to entry or innovation.⁷ Depending on the type of activity, this can be more or less of a problem, but it clearly at times has been a concern with self-regulation of various professions, such as engineers and lawyers,⁸ and in the design and installation of electrical wiring systems.⁹

IV. Examples of Self-regulatory Activities and Organizations

Advertising

⁷The Commission has challenged self-regulatory programs that allegedly restrict competition unduly and harm consumers. *See, e.g., In the Matter of California Dental Ass'n*, 121 F.T.C. 190 (1996) (Docket No. 9259) (ordering non-profit state association of local dental societies to cease and desist from restricting certain types of member dentist advertising), *aff'd, California Dental Ass'n v. F.T.C.*, 128 F.3d 720 (9th Cir. 1997), *vacated and remanded*, 526 U.S. 756 (1999) (holding “quick look” rule-of-reason analysis was not appropriate for restrictions in question), *on remand*, 224 F.3d 942 (9th Cir. 2000) (holding that ambiguous evidence failed to show restrictions had net anticompetitive effect and FTC was not entitled to remand for further fact-finding).

⁸*E.g., Nat'l Soc. of Prof. Engineers v. U.S.*, 435 U.S. 679 (1978) (holding that professional organization canon prohibiting competitive bidding was not justified under the rule of reason); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (holding that state bar fee schedule and enforcement mechanism constituted price-fixing). The Department of Justice and FTC have acted to curtail increasing efforts across the country to prevent non-lawyers from competing with lawyers through the adoption of excessively broad unauthorized practice of law rules and opinions by state courts and legislatures. *See* Letter from the Justice Department and FTC to the Kansas Bar Association Concerning Proposed Definition of the Practice of Law 2, n.3 (Feb. 4, 2005) (summarizing FTC advocacy efforts in this area); *available at* <http://www.ftc.gov/be/v050002.pdf>. *See also* the FTC's advocacy web page, <http://www.ftc.gov/be/advofile.htm>.

⁹*Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (holding that efforts to influence setting of private association's electrical wiring standards did not qualify for *Noerr-Pennington* petitioning immunity, even though those standards were routinely adopted by state and local governments).

Since it was formed in 1971 to foster truth and accuracy in national advertising through voluntary self-regulation, the BBB's own National Advertising Review Council (NARC) has earned a reputation as an effective industry self-regulation program. It sets FTC-like standards for truth and accuracy in advertising, which then are enforced through the National Advertising Division ("NAD"). NAD investigates challenges from other advertisers and from monitoring of traditional and new media, including the Internet, and most matters are resolved at this level. If, however, the advertiser is not satisfied with the NAD's decision, the matter may be appealed to the National Advertising Review Board ("NARB"). If an advertiser refuses to comply with the NAD's or NARB's decision, then the matter is sent to the appropriate government agency for review.

The Commission has previously cited NAD, which monitors general national advertising, as a model of real and meaningful self-regulation.¹⁰ NAD's association with the BBB provides a level of independence and objectivity. Its process is transparent, and its decisions are public. Significantly, it has a high level of support within the advertising industry, enjoying over 90% compliance with its decisions.

By monitoring and hearing complaints filed by industry members, not only does NAD alleviate some of the FTC's burden in monitoring deceptive advertising, but it is able to set self-regulatory decisions that provide clear guidance to advertisers. In addition, NAD allows the FTC to use enforcement resources elsewhere and maintain its focus on specific consumer injury.

¹⁰*E.g.*, FTC, ALCOHOL MARKETING AND ADVERTISING, A REPORT TO CONGRESS 9, n.37 (2003); Former FTC Chairman Robert Pitofsky described the National Advertising Division as "the best example of self-regulation that I am aware of in American industry." NAD/NARB, *A Review and Perspective on Advertising Industry Self-Regulation: Celebrating 25 Years*, Preface (quoting Chairman Pitofsky's remarks at the 1996 NARB Annual Meeting).

The one consistent criticism that I have heard is that, despite the efforts of Ken Hunter, Jim Guthrie, Steve Cole, and others, the program does not receive widespread public recognition. We are pleased that the advertising industry now is trying to extend the success of this program through establishment of The Electronic Retailing Self-Regulation Program (“ERSP”). Despite years of FTC enforcement actions and substantial education efforts by the Electronic Retailing Association, the infomercial industry has been marred by deception. We are hopeful that the ERSP can improve the industry’s record by providing a vehicle to promptly address deceptive infomercial claims and by serving as a tangible sign of a greater industry commitment to truthful advertising.

Alcohol industry self regulation

The alcohol industry also has developed self-regulatory programs to address advertising issues. The Distilled Spirits Council of the United States (DISCUS), as well as two other alcohol industry trade associations, the Beer Institute and Wine Institute, have adopted voluntary advertising codes governing the placement and content of alcohol advertising.¹¹ The three codes have provisions designed to ensure that alcohol ads are not targeted to minors under 21, who cannot legally purchase alcohol, as well as to address other advertising and marketing issues. With respect to underage consumers, the codes provide that alcohol ads should be placed only in media where persons under 21 constitute less than 30% of the audience, based upon specified audience demographic information. Additionally, all three codes have provisions that limit the

¹¹*Code of Good Practice for Distilled Spirits Advertising and Marketing* (2003), available at <http://www.discus.org/industry/code/code.htm>; *Beer Institute Advertising and Marketing Code* (1997), available at <http://www.beerininstitute.org/adcode2.pdf>; *Code of Advertising Standards, Wine Institute* (2000), available at http://www.wineininstitute.org/communications/statistics/Code_of_Advertising.htm.

content of alcohol ads, prohibiting ads that promote the intoxicating effects of alcohol and depictions of excessive drinking and of lewd sexual activity. Most importantly, they prohibit content targeted primarily to persons below the legal drinking age.

As I noted previously, one advantage of meaningful industry self-regulation is that it permits industry to address important issues of concern to the public, without raising the same First Amendment issues that government regulation would pose. The industry's voluntary alcohol advertising codes, by limiting the underage audience to 30%, set a bright-line standard that reduces the likelihood that alcohol ads will appear in media that appeals primarily to those under the legal drinking age.

Since 1999, the FTC has encouraged these trade associations to strengthen their programs.¹² We have asked them to adopt third-party review systems of ad compliance, so that

¹²See FTC, SELF-REGULATION IN THE ALCOHOL INDUSTRY: A REVIEW OF INDUSTRY EFFORTS TO AVOID MARKETING ALCOHOL TO UNDERAGE CONSUMERS (1999), *available at* <http://www.ftc.gov/reports/alcohol/alcoholreport.htm>; FTC, ALCOHOL MARKETING AND ADVERTISING, A REPORT TO CONGRESS (2003), *available at* <http://www.ftc.gov/os/2003/09/alcohol08report.pdf>. The 1999 Alcohol Report concluded that the industry took self-regulation seriously, but that improvements in standards and compliance were needed. The 1999 Report recommended that the industry improve enforcement of best practices by adopting third-party review of compliance and reduce underage exposure to alcohol ads by changing the current placement standards that allow advertising in media when as much as 50 percent of the audience is under 21.

The 2003 Alcohol Report, issued in response to a request from Congress for an update on alcohol marketing, was based upon review of documents produced pursuant to compulsory process issued to nine major industry members. It found that companies had achieved 99% compliance with the ad placement standard, which at the time provided that no more than 50% of the audience for an alcohol ad consist of minors under 21. In addition, the report announced that the industry had improved its standard, now providing that minors can constitute no more than 30% of the audience for alcohol ads. The Commission continued to caution industry about the need to ensure that alcohol ad content not have undue appeal to minors.

the advertiser is not the sole arbiter of its own compliance. Additionally, we have asked them to make the process transparent by publicizing the results of any third-party review.

DISCUS has adopted a third-party review process. It has an industry review board consisting of DISCUS members to rule on complaints about advertising, and it has an external review board of experts in advertising and regulation that is available to rule on complaints in the event that the internal board cannot reach a decision.¹³ In March 2005, DISCUS for the first time published a report detailing the internal review board's action on fifteen advertising complaints received in 2004.¹⁴ The injection of transparency into the third-party review process is a positive step, and I encourage other segments of the alcohol industry to follow suit.

We at the FTC work to encourage effective self-regulation in the alcohol industry. The FTC staff communicates with companies about the mechanisms that they use to ensure compliance with the 30% standard. We request audits of past placements to assist companies to identify placement problems and prevent recurrence. We communicate with companies when we see advertising that appears to be at odds with code standards, although in the end whether a violation has occurred must be determined by the industry, not the FTC.

Entertainment industry self regulation

Because courts generally have considered entertainment media products to be fully-

¹³See *Code of Good Practice for Distilled Spirits Advertising and Marketing* (2003), available at <http://www.discus.org/industry/code/code.htm>. See also <http://www.discus.org/industry/code/press/2003-09-09a.htm> (DISCUS press release describing these improvements).

¹⁴Distilled Spirits Council of the United States, *SEMI-ANNUAL CODE REPORT* (2005), available at <http://www.discus.org/pdf/SemiAnnualCode.pdf>.

protected speech, the advertising and marketing of these products also poses special constitutional challenges. In response to public concerns about the violent content of their products and its suitability for children, the motion picture (MPAA), music recording (RIAA), and electronic game (ESA) industries each have in place a self-regulatory system that rates or labels products in an effort to help parents seeking to limit their children's exposure to violent materials.¹⁵ Their systems govern the placement of advertising for Restricted (R)-rated movies, Mature (M)-rated games, and Explicit-Content Labeled recordings in media popular with teens and require the disclosure of rating and labeling information in advertising and on product packaging.

At the request of the President and Members of Congress, in June 1999, the FTC conducted a study to determine whether members of the entertainment industry marketed violent adult-rated material to children. Since that time, the FTC has issued five reports on the self-regulatory practices of these three industries, examining compliance with their voluntary marketing guidelines.¹⁶ The reports document instances in which some industry members

¹⁵MOTION PICTURE ASSOCIATION OF AMERICA, *MOVIE RATINGS, HOW IT WORKS* (2005), available at <http://www.mpa.org/movieratings/about/index.htm>; RECORDING INDUSTRY ASSOC. OF AMERICA, *PARENTAL ADVISORY* (2005), available at <http://www.riaa.com/issues/parents/advisory.asp>; ENTERTAINMENT SOFTWARE RATING BOARD, *ESRB GAME RATINGS* (2005), available at <http://www.esrb.org/esrbratings.asp>.

¹⁶FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (2000), available at <http://www.ftc.gov/reports/violence/vioreport.pdf>; FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A SIX-MONTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (2001), available at <http://www.ftc.gov/reports/violence/violence010423.pdf>; FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A ONE-YEAR FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES*

engaged in marketing practices that undermined the self-regulatory systems that the industries themselves put into place, as well as instances in which other members did more than their industry required.

The Commission found substantial compliance by movie and game marketers with voluntary, self-regulatory standards requiring the disclosure of rating and labeling information in advertising and product packaging. Marketers of music also complied with such self-regulatory standards, but to a far lesser extent. The Commission also found encouraging widespread compliance by the movie and game industries with existing guidelines limiting ad placements for violent R- and M-rated entertainment products in media with a large percentage of teens in the audience.

Despite some of the positive self-regulatory efforts of the entertainment industry, the Commission still has had concerns about certain practices. In late 2003, the FTC sponsored a public workshop to discuss the state of self-regulation in the entertainment industry and children's access to inappropriate products. In March 2004, the Commission announced the expansion of its consumer complaint system to categorize and track complaints about media violence, including complaints about the advertising, marketing, and sale of violent movies, electronic games, and music. The Commission issued a fourth follow-up report on July 8, 2004, which showed the elimination of the most egregious practices discovered in the 2000 report and

(2001), *available at* <http://www.ftc.gov/os/2001/12/violencereport1.pdf>; FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A TWO-YEAR FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (2002), *available at* <http://www.ftc.gov/reports/violence/mvecrpt0206.pdf>; FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FOURTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (2004), *available at* <http://www.ftc.gov/os/2004/07/040708kidsviolencrpt.pdf>.

a steady, although by no means complete, improvement in most other practices.¹⁷

Non-Industry Watchdogs

An example of a third-party certifier and information provider is the long-established certification organization, the Good Housekeeping Institute, which is the consumer product evaluation laboratory of Good Housekeeping magazine. I recently paid a visit to the Institute, which was founded in 1900 and has departments specializing in engineering, chemistry, food, food appliances, nutrition, beauty products, home care, and textiles. The Good Housekeeping seal, which was established in 1909, may be carried only by those products whose ads have been reviewed and accepted for publication in the magazine. Good Housekeeping promises that if a product bearing the seal proves defective within two years of purchase, Good Housekeeping will replace it or refund the purchase price. The Institute also issues reports about products and it tests approximately 2,000 products annually. Over its history, the Good Housekeeping Institute has been in the vanguard in improvements in food and product safety and has spurred action by Congress and industry.

Consumers Union, an independent, nonprofit testing and information organization that publishes Consumer Reports magazine, is a well-known example of a certifier and information provider. Consumers Union states that its income is derived solely from the sale of Consumer Reports and other services and from noncommercial contributions, grants, and fees. Thus, it avoids the mixed motive problems that I mentioned in connection with industry-funded self-regulatory organizations. It provides consumers with advice and information about products and

¹⁷The recording industry is an example of a less successful self-regulatory attempt. Out of the three entertainment industries examined by the FTC, it made the least progress in restricting youth access to violent and inappropriate material.

services, personal finance, health and nutrition, and other consumer concerns, and its highly influential Consumer Reports ratings and recommendations are a popular resource for consumer information.

Weight loss advertising

A report on weight loss advertising that the Commission is releasing today provides further support for the effectiveness of self-regulation. Weight loss is big business (pardon the pun). According to the Surgeon General, 61 percent of American adults are overweight and, at any one time, an estimated 70 million Americans are trying to lose weight.¹⁸ Unfortunately, too many of the products advertised to consumers are more likely to reduce the bulk in consumers' wallets than their waistlines. We have seen products like "Fat Trapper" and "Exercise in a Bottle" that promise fast and easy weight loss with claims that you can "eat what you want and never - ever - ever have to diet again." Other outrageous claims for weight loss products that we have seen include, "works faster than a hunger strike! Even if you eat nothing you won't slim down as fast," and "burns off more fat than running 98 miles per week." As ridiculous as these sound, mainstream magazines, newspapers, and cable television stations have run advertisements containing these and other outrageous and utterly false weight loss claims, which gives the claims credibility with some consumers.

In 2001, FTC staff conducted a non-scientific survey that indicated that the number of advertisements for weight loss products containing facially false claims had actually increased, despite a decade of law enforcement. Indeed, in 2001, we found that almost half the ads for

¹⁸See "Overweight and Obesity: At a Glance," *available at* http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_glance.htm.

weight loss products included at least one claim that was facially false.¹⁹ To combat this problem, we decided to enlist the media as an ally in our campaign. In 2003, we published a guide that describes seven claims in weight loss ads that should raise red flags because they are always false.²⁰ We asked the media to refuse to run advertisements that make the “Red Flag” claims. Then-Chairman Muris and Commissioner Leary met with members of the media and asked that they “do the right thing.”²¹

I am pleased to announce that many apparently have done so. Today, we are issuing a report based on data gathered in 2004, which appear to show that the media has responded to our challenge.²² We repeated our survey of weight loss advertisements and, a year after first asking the media for help, we found that the number of ads with Red Flag claims had fallen from almost 50 to 15 percent. Fifteen percent is still too high, but the progress is remarkable. For some of the worst claims – like the promise of substantial weight loss without diet or exercise – the results are even better, down from a whopping 43 percent to 5 percent of weight loss product ads. Continued effort is necessary. Nonetheless, these figures suggest substantial progress, and I

¹⁹FTC, RED FLAG, BOGUS WEIGHT LOSS CLAIMS (2003), *available at* <http://www.ftc.gov/bcp/online/edcams/redflag/falseclaims.html>.

²⁰FTC, DECEPTION IN WEIGHT-LOSS ADVERTISING WORKSHOP: SEIZING OPPORTUNITIES AND BUILDING PARTNERSHIPS TO STOP WEIGHT-LOSS FRAUD ii (2003), *available at* <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf>.

²¹FTC Chairman Timothy J. Muris, Do the Right Thing, Remarks Before the Cable Television Advertising Bureau (Feb. 11, 2003), *available at* <http://www.ftc.gov/speeches/muris/030211rightthing.htm>.

²²FTC STAFF, 2004 WEIGHT-LOSS ADVERTISING SURVEY (2005), *available at* <http://www.ftc.gov/os/2005/04/050411weightlosssurvey04.pdf>.

commend those members of the media that have made conscientious efforts to screen out these blatantly deceptive ads.

V. Food Marketing To Children

Of course, the problem of obesity is not limited to adult consumers. In fact, health experts find the doubling of the percentage of our children who are obese to be even more alarming.²³ There are many possible causes: eating too many snacks; watching too much television, playing too many video games, and sitting for hours in front of the computer; not getting enough exercise; eating large servings at favorite restaurants; among others. In seeking to address this serious problem, many are fixing the spotlight on the marketing of food to children and are calling for legislative and regulatory limitations. Others argue that such restrictions would contribute little to the solution, positing that food advertising does little more than shift the brand of popular drinks, snack foods, or cereals that children will eat anyway. Others debate the role of parental responsibility for their children's health.

I doubt that we will ever fully resolve the debate to all parties' satisfaction. But we do not need to. It is far more productive to focus on what industry, the public health community, and government can do, now, to contribute to solutions. Some have begun to take action. Entertainment companies like Nickelodeon and Disney, for example, are already applying their marketing knowledge to educating kids about nutrition. Some food and beverage companies, like Kraft and PepsiCo, are making some changes to their products and marketing practices.

²³See, e.g., *Preventing Childhood Obesity: Health in the Balance*, Committee on Prevention of Obesity in Children, Youth, Food and Nutrition Board, Institute of Medicine (2004).

Collectively, these individual actions are spurring changes in the way foods are marketed to children.

In an effort to focus the ongoing debate, the Federal Trade Commission, together with the Department of Health and Human Services, will hold a two-day workshop this summer in Washington. This will provide a forum for addressing concerns regarding the marketing of food and beverages to children and will include a discussion of industry self-regulation efforts, such as CARU.

We do not view this as the first step toward new government regulations to ban or restrict food advertising and marketing to children. The FTC tried that approach in the 1970s, and it failed for good reasons. But, it is an opportunity to examine what is and is not working and to explore what more can be done through responsible marketing, product innovations, and other approaches to promote healthy food choices and lifestyles for our children.

VII. Conclusion

Fashioning effective industry self-regulation is a challenging endeavor that requires creativity, commitment, and persistence. Experience suggests that self-regulatory organizations that work best often have the following elements: clear requirements; widespread industry participation; active monitoring; effective enforcement mechanisms; procedures to resolve conflicts; a transparent process; responsiveness to a changing market and to consumers; sufficient independence from direct control by industry; and a procompetitive approach.

The BBB is a fine example of a well-functioning, self-regulatory agency, and I appreciate its efforts on behalf of American consumers. Staying ahead of new threats to consumers and the

marketplace calls for the best efforts of government, industry, and consumer organizations, both individually and cooperatively. I look forward to continuing our work together. Thank you.