

*“Helping the FTC Help You: Effective Self-Regulation is Better Business”*

**Keynote Address by Commissioner Pamela Jones Harbour**

**Before the National Advertising Division Meeting**

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**I. INTRODUCTION**

Good morning. I am delighted to be here to speak with you today .

Before I begin, let me make the usual disclaimer: the views I express here are my own, and are not necessarily those of the Federal Trade Commission (“FTC” or “Commission”) or any other individual Commissioner. Wherever possible, however, I will point you towards Commission publications and statements that do reflect the Commission’s or its staff’s positions.

The key message I want to convey today is that industry self-regulation – when done properly and effectively – is beneficial to businesses as well as consumers. As I will explain in more detail, some self-regulatory efforts in the advertising and marketing field have been more successful than others. While I am pleased to see how much progress has been made, there is always room for improvement. Therefore, I hope to leave you with two things today: motivation to try even harder and knowledge of some concrete ideas for further action.

**II. THE COMMISSION’S GENERAL POSITION ON SELF-REGULATION**

The FTC is committed to protecting consumers, through both regulatory and non-regulatory approaches. The Commission has a long history of promoting self-regulation when it will adequately protect consumers’ interests.

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”<sup>1</sup> and “has encouraged self-regulation”<sup>2</sup> where appropriate.

### **III. NAD and ERSP: EXAMPLES OF SELF-REGULATION**

Specifically, the Commission has been supportive of the work of the National Advertising Division (“NAD”). For example, in 1998, former FTC Chairman Robert Pitofsky described NAD as “an effective model” of industry self-regulation.<sup>3</sup> Our current Chairman, Deborah Platt Majoras, echoed these remarks in a speech to the Council of Better Business Bureaus in April 2005.<sup>4</sup> Since its inception in 1971, NAD has handled over 4000 cases of national advertising directed to adults.<sup>5</sup>

The National Advertising Review Council (“NARC”) also administers another self-regulatory program, ERSP, which recently was started by the Electronic Retailing Association (“ERA”) and is targeted to direct response advertisers.<sup>6</sup> Both NAD and ERSP use independent attorneys to review advertisements to determine whether they are deceptive.<sup>7</sup> When a marketer refuses to participate in either process, or refuses to change its advertising as recommended by the NAD or ERSP decision, then the NAD or ERSP refers the case to the FTC or other appropriate government agency.<sup>8</sup>

The FTC takes refusals to participate in NAD or ERSP proceedings very seriously, and has brought numerous actions after referrals from these programs.<sup>9</sup> I am not able to comment on any ongoing investigations that have not yet resulted in law enforcement actions, but I can assure you

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

#### **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.”<sup>11</sup> 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.”<sup>12</sup> 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 claims include promises that a product:

- ! causes weight loss of two or more pounds a week for one month or more without dieting or exercise;
- ! causes substantial weight loss, no matter what or how much the consumer eats; or

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

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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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, self-regulation, and childhood obesity issues.<sup>17</sup>

At that workshop, Senator Tom Harkin made clear his belief that voluntary measures and self-regulation must be improved. He warned that “where corporate responsibility is absent, federal regulation of food and marketing directed at children will be necessary,” but he also expressed his “hope that real restraint and leadership will come from within the food and advertising industries.”<sup>18</sup>

During the workshop, critics of food advertising to children zeroed in on particular commercials, including: one that showed cereal that looked and tasted like candy bars and came from a candy machine;<sup>19</sup> one with dancing fruits and vegetables that dissolved into a gummy bear;<sup>20</sup> and one with fruit hopping into a blender and having candy come out at the other end.<sup>21</sup>

The Children’s Advertising Review Unit (“CARU”) is “a Division of the Council of Better Business Bureaus, created in 1974 at the request of the advertising industry with a mandate to ensure that advertising directed to [children] under 12 is truthful, accurate and appropriate for the developing cognitive abilities of its audience.”<sup>22</sup> One of CARU’s guidelines is that copy, sound and visual presentations should not mislead children about product or performance characteristics, including nutritional benefits.<sup>23</sup>

A CARU representative at the joint FTC/HHS workshop explained that CARU also took issue with the commercials that were particularly offensive to critics. For example, she explained that CARU also had a problem with the ad showing some fruit jumping into a blender and coming out as candy, and that the advertiser pulled the ad off the air at CARU’s request.<sup>24</sup>

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.<sup>25</sup>

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;<sup>26</sup>
- ! not advertising less healthy food choices to children under the age of 12;<sup>27</sup> and
- ! not advertising less healthy food choices in schools.<sup>28</sup>

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.<sup>29</sup>

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 – I encourage those of you who deal with children’s advertising to look closely and critically at ads directed to children – before they air. You might ask yourself: what might this ad convey to a child?<sup>30</sup> Might it convey that candy or cookies (however packaged) are a good breakfast food for children? Might it convey that sugary snacks are a good substitute for fruit? Above all, you might want to ask yourself or your clients: am I a marketer or advertiser who is aware of the current concern over children’s obesity, and would like to address that concern through responsible marketing?

A recent NAD/CARU white paper stated, “law enforcement is the last line of defense against deceptive advertising. It is first and foremost the responsibility of food manufacturers and their advertising agencies to make sure that the messages they disseminate in advertising comply with applicable standards.”<sup>31</sup> More fundamentally, I encourage you to do whatever you can to address the problem of childhood obesity, not just through responsible advertising, but perhaps by sponsoring public service announcements, as well as by considering how you might change your products to make them healthier.

### **C. Alcohol: Responsible Advertising and Avoiding Advertising to Youth**

Some areas of advertising already have attracted Congressional scrutiny. For example, Congress has been paying close attention to the effects of alcohol advertising on youth. Congress has, in the past, directed the FTC to issue reports and recommendations about the alcohol industry’s efforts at self-regulation. In our 2003 *Report on Alcohol Marketing and Advertising*, the Commission noted

that the alcohol industry committed to adhere to a 70 percent adult audience placement standard and to implement post-placement audits.<sup>32</sup> 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.”<sup>33</sup>

I hope that those of you in the business of advertising alcohol will go the extra mile to ensure that the 70 percent standard is met. I encourage you to aim for an even higher standard – an adult audience of 75 percent or more. If your placements aim for only a 70 percent adult audience, there will be some spillover at times when the youth audience actually exceeds 30 percent, sometimes significantly.

Our report to Congress also recommended enhanced self-regulation to address concerns about alcohol advertising that appeals to those under the legal drinking age.<sup>34</sup> Specifically, the report stated that the Commission “continues to believe that third-party review provides an important measure of credibility to self-regulation and encourages all companies to adopt some form of an external review process.”<sup>35</sup> Some segments of the alcohol industry have incorporated some form of third party review into their compliance procedures, but others still have not done so.

I commend the industry for restricting alcohol product placements to movies and television shows with mature themes or R-ratings. However, I remind you that 17-to-21-year-olds are legally able to watch R-rated movies, even though they legally cannot drink. If you or your clients use these kinds of alcohol product placements, I urge you to consider whether the audience for a particular R-rated movie will include a significant percentage of under-21-year-olds. If so, the better policy would be not to use the product placement.

#### **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.”<sup>36</sup>

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%.”<sup>37</sup> 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.”<sup>38</sup>

##### *1. Movies*

With respect to movies, the Commission found that studios disclosed both ratings and rating reasons for R-rated and PG-13- rated films and DVDs.<sup>39</sup> In contrast, retailer advertisements for DVDs often did not contain any ratings or reasons.<sup>40</sup> Retailer attitudes towards advertising are mirrored in actual store sales. The FTC staff conducted an undercover shopper survey of children's access to R-rated films. While only 36 percent of 13-to-16-year-old shoppers successfully purchased tickets to R-rated movies showing in theaters, an overwhelming 81 percent of teen shoppers were able to purchase R-rated DVDs from DVD retailers.<sup>41</sup>

## 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."<sup>42</sup> Moreover, the music industry's "compliance with labeling requirements for product packaging has improved only slightly since September 2000."<sup>43</sup> 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."<sup>44</sup>

## 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."<sup>45</sup> On a positive note, ratings information was prominently displayed in advertising and on product packaging.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup> 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.”<sup>50</sup> 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.”<sup>51</sup> 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.<sup>52</sup>

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.”<sup>53</sup> Otherwise, it must be removed from the final disc.<sup>54</sup> 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 of the rating.”<sup>55</sup>

It is essential that ratings boards have all possible pertinent information about a product to adequately assess its content. Parents should be able to rely on ratings to determine whether a movie, CD or electronic game is appropriate for their children.<sup>56</sup> Any deception in marketing these types of products will not be taken lightly by the Commission.

#### **E. The Internet and New Methods of Marketing**

Finally, I would like to touch briefly on the role of technology in creating new methods of marketing. The Internet offers great possibilities for consumers, businesses, and advertisers. On the other hand, new technologies may facilitate deception or unfair practices.

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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> The Commission recently settled an action where such consent from consumers was not obtained.<sup>60</sup>

## 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 marketers. If consumers are enticed into buying a bogus weight loss product, they may not buy a legitimate weight loss product or service from your company.

Your advertising dollars are too precious to waste on deceptive or misleading statements. Thus, I urge all of you to support the highest standards in the advertising industry. In addition to appeasing your moral conscience, I am convinced that you will reap even greater returns through more satisfied customers.

Thank you for your time today, and I hope that you enjoy the rest of the conference.

1. See FTC POLICY STATEMENT REGARDING ADVERTISING SUBSTANTIATION, *Appended to Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987), available at <http://www.ftc.gov/bcp/guides/ad3subst.htm>.
2. FTC, STATEMENT OF REGULATORY PRIORITIES, 69 Fed. Reg. 72885 (Dec. 13, 2004), available at <http://www.gpoaccess.gov/ua/browse1204.html> (under Regulatory Information Service Center / the Regulatory Plan).
3. Robert Pitofsky, Former Chairman, Federal Trade Commission, *Self Regulation and Antitrust*, prepared remarks before the D. C. Bar Association Symposium (Feb. 18, 1998), available at <http://www.ftc.gov/speeches/pitofsky/self4.htm>.
4. Deborah Platt Majoras, Chairman, Federal Trade Commission, *Self Regulatory Organizations and the FTC*, Address before the Council of Better Business Bureaus (Apr. 11, 2005), available at <http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf>.
5. See <http://www.nadreview.org/> (Latest Cases).
6. See *The Electronic Retailing Self- Regulation Program Policy & Procedures* (Aug. 2004), available at <http://www.narcpartners.org/ersp/ERSPPProcedures.pdf>.
7. *Id.*; see *The Advertising Industry's Process of Voluntary Self-Regulation: Policies and Procedures by The National Advertising Review Council* (Aug. 23, 2005), available at <http://www.nadreview.org/> (Procedures).
8. *Id.* The ERA also may expel a marketer from its membership if the marketer refuses to revise or withdraw a noncompliant advertising campaign to meet the ERSP standards. "ERA's Self Regulation Program – Frequently Asked Questions," available at <http://www.narcpartners.org/ersp/faq.asp>.
9. See, e.g., FTC News Release, *FTC v. Bogdana* (May 12, 1998), available at <http://www.ftc.gov/opa/1998/05/bogdana.htm> (Jodie Bernstein, then Director of the FTC's Bureau of Consumer Protection, noted "I am especially concerned that the advertisers continued to make deceptive claims even after the advertising was challenged by the [NAD]. The Commission staff supports the self-regulatory process and has worked with the dietary supplement industry to educate members about the truth-in-advertising requirements. But, as this case illustrates, when self-regulation fails, we are prepared to take action"); FTC News Release, *FTC Targets Bogus Anti-Aging Claims for Pills and Sprays Promising Human Growth Hormone Benefits* (June 9, 2005), available at <http://www.ftc.gov/opa/2005/06/greatamerican.htm> (settlement provides for up to \$20 million in consumer redress) and Press Release, *ERSP Refers Ultimate HGH Infomercial to the FTC* (Sept. 10, 2004), available at <http://www.narcpartners.org/reports/list.aspx>. In some instances, the Commission may have been involved with its own independent investigation when the matter was referred to NAD. See FTC News Release, *FTC v. Robert Chinery, Jr.* and *In the Matter of Cytodyne* (July 13, 2005),

- <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 NAD that the FTC, pursuant to its far-reaching review of advertising for nutritional and dietary supplements over the past few years, is currently reviewing the advertising for Xenadrine-EFX”).
10. FTC POLICY STATEMENT REGARDING ADVERTISING SUBSTANTIATION, *supra*, n.1. The Commission noted in this Policy Statement that, although “[t]he Commission traditionally has enjoyed a close working relationship with self regulation groups . . . whose regulatory policies have some bearing on our law enforcement initiatives,” “the Commission will make its judgment independently, evaluating each case on its merits.”
  11. FTC STAFF REPORT, WEIGHT-LOSS ADVERTISING: AN ANALYSIS OF CURRENT TRENDS (Sept. 2002), at vii, available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>.
  12. Available at <http://www.ftc.gov/bcp/online/pubs/buspubs/redflag.pdf>; see also FTC News Release, *FTC Releases Guidance to Media on False Weight-Loss Claims* (Dec. 9, 2003), available at <http://www.ftc.gov/opa/2003/12/weightlossrpt.htm>; see generally FTC Web Site, *Red Flag: Bogus Weight Loss Claims*, at <http://www.ftc.gov/bcp/online/edcams/redflag/index.html>.
  13. *Id.*
  14. FTC News Release, *FTC Launches “Big Fat Lie” Initiative Targeting Bogus Weight-loss Claims* (Nov. 9, 2004), available at <http://www.ftc.gov/opa/2004/11/bigfatliesweep.htm> (Publications included *Cosmopolitan*, *USA Weekend*, *San Francisco Chronicle*, and Spanish-language publications, such as *TeleRevista Magazine*).
  15. FTC News Release, *FTC Settles Claims with Marketers of FiberThin and Propolene* (June 20, 2005), available at <http://www.ftc.gov/opa/2005/06/fiberthin.htm> (noting that FiberThin and Propolene, two fiber-based dietary supplements defendants claimed would cause rapid, substantial weight loss without any need to diet or exercise, were advertised through a 30-minute television infomercial that aired on numerous television stations, including The Learning Channel, PAX Family Entertainment Network, Home and Garden TV, and CNBC); FTC News Release, *FTC Takes Action Against Marketers of Top-Selling Xenadrine EFX* (July 13, 2005), available at <http://www.ftc.gov/opa/2005/07/xenadrine.htm> (noting that Xenadrine EFX was heavily advertised in print and on TV, including in such publications as *People*, *TV Guide*, *Cosmopolitan*, *Glamour*, *Let’s Live*, *Men’s Fitness*, and *Women’s World*).
  16. In April 2005, FTC staff released a report which compared a sample of weight-loss advertisements collected from February through May 2004 to a similar sample from a survey done in 2001. In general, using the Red Flag criteria, this comparison suggested

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. PERSPECTIVES ON MARKETING, SELF-REGULATION, AND CHILDHOOD OBESITY: A Joint Workshop of the Federal Trade Commission and the Department of Health and Human Services (“CHILDHOOD OBESITY WORKSHOP”). Transcript and other materials *available at* <http://www.ftc.gov/bcp/workshops/foodmarketingtokids/index.htm>.
18. Transcript of CHILDHOOD OBESITY WORKSHOP for July 14, 2005 at 39, *available at* [http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript\\_050714.pdf](http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050714.pdf). Senator Harkin’s remarks are at pp. 28-41.
19. *See id.* at 293. (This commercial was shown during the presentation of Victoria Rideout, Vice President, Kaiser Family Foundation, approximately 6 hours 30 minutes into the videocast *available at* <http://www.ftc.gov/bcp/workshops/foodmarketingtokids/index.htm>.)
20. *Id.* at 260 (comments of Dr. Carol Byrd-Bredbenner, Professor of Nutrition, Rutgers University).
21. *Id.* at 296 (This commercial was shown during the presentation of Victoria Rideout approximately 6 hours 32 minutes into the videocast *available at* <http://www.ftc.gov/bcp/workshops/foodmarketingtokids/index.htm>.)
22. Transcript of CHILDHOOD OBESITY WORKSHOP for July 15, 2005 at 36 (presentation of Elizabeth L. Lascoutx, Director, Children’s Advertising Review Unit), *available at* [http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript\\_050715.pdf](http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050715.pdf); *see also* <http://www.caru.org>. CARU also refers matters to the FTC or other appropriate government agencies if a company refuses to cooperate with CARU’s voluntary program. *See n.7.*
23. *Id.* at 37.
24. *Id.* at 38. Ms. Lascoutx also explained that advertising and packaging for Unilever’s Popsicle Juice Pops originally contained the statement “real fruit juice pops,” which CARU determined might cause children to think that the pops were 100 percent juice when they were only 30 percent juice. The advertiser eliminated that claim from both advertising and packaging. *Id.* at 37-38. She also indicated that the amounts of featured products should be within reasonable levels for the situation depicted. Thus, CARU requested that Pringles change an ad that showed four youths, each with his or her own six-serving can of Pringles. The advertiser agreed to show single-serving cans in future ads. *Id.* at 39.

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”).
29. Panelists discussed improving the healthfulness of existing products by, for example, removing fat or calories; using more whole grains or fiber; making packages or portion sizes smaller; making healthier products specifically for children; and adding healthy items such as fruit or low-fat yogurt as available food options. Transcript of CHILDHOOD OBESITY WORKSHOP for July 14, 2005 at 144-47; 157-59; 178; and 207-13.
30. When representations or sales practices are targeted to a specific audience, such as children, the Commission determines the effect of the practice on a reasonable member of that group. FTC POLICY STATEMENT ON DECEPTION (Oct. 14, 1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.
31. *Guidance for Food Advertising Self-Regulation: An historical overview of the investigations of food, nutrition, and weight loss advertising of the Children's Advertising Review Unit (CARU) and the National Advertising Division (NAD): NAD/CARU White Paper (May 28, 2004) at 2, available at [http://www.narcpartners.org/reports/NARC\\_White\\_Paper\\_6-1-04.pdf](http://www.narcpartners.org/reports/NARC_White_Paper_6-1-04.pdf)*
32. FTC, ALCOHOL MARKETING AND ADVERTISING: A REPORT TO CONGRESS (Sept. 2003) at 13, available at <http://www.ftc.gov/os/2003/09/alcohol08report.pdf>.
33. *Id.* at *ii*.
34. *Id.* at 23.
35. *Id.* at *i*.

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](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](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.