Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20230

Advertising of	)	Comment, P024527
Weight Loss Products Workshop	)	

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION AND THE CABLETELEVISION ADVERTISING BUREAU

The National Cable & Telecommunications Association ("NCTA") and the Cabletelevision Advertising Bureau ("CAB") hereby submit comments on issues raised in connection with the Commission's workshop on the advertising of weight loss products.

NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers. NCTA's members also include companies operating more than 200 cable program networks, as well as providers of other services and equipment to the cable industry.

CAB is a trade association whose primary mission is to encourage advertisers to invest more advertising dollars in cable. CAB's members include more than 60 cable networks, which account for approximately 95% of the advertising placed on cable networks, and cable operators, which represent about 85% of the nation's cable systems that accept advertising.

The cable industry welcomes the Commission's efforts to find effective approaches to "fighting the proliferation of misleading claims for weight loss products."

Like other media, many cable systems and cable program networks rely on advertising as an important source of sustaining revenue. But it is not so important that they would knowingly and willfully convey false, misleading and potentially harmful information to their customers and viewers.

Monitoring and detecting such material is not always easy or feasible for cable operators and program networks. Nor is it economically feasible – or desirable for viewers – to impose an overbroad ban on all advertising that *might conceivably* be false or misleading. But if there are ways to help systems and networks identify and prevent the distribution of clearly false and misleading advertising, the cable industry and its customers will be the beneficiaries.

Although cable systems typically receive the bulk of their revenues from monthly fees paid by subscribers, systems also sell advertising. Some advertising may be included on a cable system's "local origination" channels – *i.e.*, channels produced by the system itself, which usually include programming of local interest. Also, as part of their affiliation agreements with cable systems, national or regional satellite-delivered cable program networks often provide local advertising availabilities, so that systems also insert locally sold advertising in the network programming that they carry.

According to the Cabletelevision Advertising Bureau ("CAB"), approximately 2,500 systems serving about 90% of the nation's subscribers currently sell their own advertising. A total of more than 2.7 billion commercial units of advertising are sold annually by these systems. The revenue from such advertising represents about 7% of the systems' total revenue.

Similarly, although cable program networks may receive licensing fees from the cable systems that carry them, most are either partly or wholly dependent on advertising as a principal source of revenue. More than 120 national cable program networks carry advertising, and the revenues from such advertising represent about half of all network revenues. The approximately 60 cable network members of CAB sell more than 13 million commercial units annually. On a per-network basis, this represents almost 217,000 units. By comparison, the three largest broadcast networks sell approximately 450,000 units – or 150,000 per network.

But the revenue per unit for cable networks is much smaller than the revenue per unit for the broadcast networks. The average cost of a prime time 30-second spot for cable networks is $11,000. For broadcast networks (which rely on advertising for 100% of their revenues), it is more than ten times higher – $116,000.

With a tenth of the prime time revenues produced by almost half again as many commercial units as the broadcast networks, it would hardly be reasonable to expect each cable program network to be able to devote the same resources as the broadcast networks to reviewing and substantiating the claims made by all the advertisements they carry. Nevertheless, most networks – and many cable system operators – *do* have policies and standards governing the advertisements that they will and will not carry.

Moreover, the CAB has promulgated comprehensive "Voluntary Guidelines for Commercial Standards and Practices," a copy of which is attached to these comments. These guidelines embody the industry's effort to avoid "techniques, presentations, approaches, and claims that are likely to mislead or offend viewers or competing

advertisers."[1] They specifically include provisions regarding the advertising of foods, nutritional supplements, and weight loss products or programs.

But actually substantiating the advertising claims in particular weight loss product advertising to determine whether they are deceptive or misleading is simply beyond the resources that many cable program networks and system operators can economically devote to their advertising departments. Where, as in the case of weight loss advertising, there may be a proliferation of deceptive advertising for questionable products, one alternative to trying to substantiate the claims made in each advertisement may simply be to paint with a broad brush and simply refuse to carry *all* advertisements for a particular type of product. But, depending on the product, that approach may not only be costly to cable operators and networks but also unfair to advertisers whose products *are* effective and whose claims are truthful and not misleading. And an overbroad approach that precludes the truthful advertising of a lawful product keeps consumers from receiving information that may be useful to them.

This is one reason why, from a First Amendment perspective, making the media that carry advertising legally responsible for the truthfulness of such advertising would be particularly problematic. Ad substantiation is an imprecise business even for those media that have the resources to engage in it. Even for those media – and especially for media that do not have the resources to examine each claim – the safest path to avoiding liability would be to err on the side of rejecting entire classes of product advertising, even if this

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[1] CAB Guidelines, p.2.

meant rejecting some truthful and non-deceptive advertisements. This is precisely the sort of chilling effect on protected speech that the government may not itself impose.[2]

Voluntary industry self-regulation of the sort embodied by the CAB Guidelines is, of course, not subject to First Amendment constraints. Moreover, to the extent that, pursuant to industry self-regulation, cable operators and networks were to err on the side of accepting ads that were not self-evidently untruthful and deceptive, any chilling effect of such self-regulation would be minimal.

But if, as the Commission suggests, self-regulation has not been sufficiently effective in preventing the dissemination of untruthful and deceptive claims in advertising for weight loss products, the industry welcomes the opportunity to explore whether there are reasonable ways to make it more effective without unduly straining the resources or diminishing the legitimate revenues of operators and programmers or unduly chilling protected speech.

While it may not be possible, short of barring all advertising for weight loss products, to ensure that every claim in every advertisement is truthful and not deceptive, the Commission's workshop may identify possible means of reducing, if not completely precluding, the dissemination of claims that are unquestionably and egregiously false and misleading. There is no reason why any media should knowingly disseminate such

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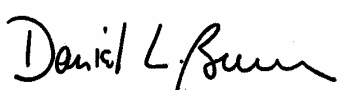
[2] *See*, *e.g.*, *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *Pittman v. Dow Jones & Co., Inc.*, 662 F. Supp. 921 (E.D. La. 1987); *Walters v. Seventeen Magazine*, 241 Cal. Rptr. 101 (1987).

claims, and if such means are in fact identified, NCTA and CAB look forward to sharing and examining them with its members.

Respectfully submitted,



Daniel L. Brenner
Michael S. Schooler
1724 Massachusetts Avenue, NW
Washington, DC 20036
(202) 775-3664
Counsel for National Cable & Telecommunications Association

Jill Luckett
Vice President,
Program Network Policy, NCTA

Joe Ostrow
President and CEO
Cabletelevision Advertising Bureau

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