UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

| | |
|---|---|
| In the Matter of Advertising of Weight Loss Products Workshop - Comment, PO24527 | : |

**SUPPLEMENTARY 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. 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.

ERA was pleased to have been invited as a participant in the Commission's "Deception in Weight Loss Advertising" workshop (the "Workshop") on November 19, 2002. On October 31, 2002, ERA submitted 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"). Now that the Workshop has taken place, ERA is submitting these supplementary comments so that it can more constructively address the issues raised during the Workshop.

ERA shares the Commission's concerns about improper advertising and marketing of weight loss products. However, ERA raises the following concerns about the direction the Commission appears to be taking. First, ERA respectfully urges the Commission not to take the findings of the Workshop's science panel as conclusive. While the panel featured a respected group of industry experts, ERA noted several problems inherent in the informal polling process. Second, ERA is concerned that the Commission's "quick look" proposal to ban a specific list of weight loss claims are likely to violate the First Amendment. Moreover, ERA believes that such a ban runs counter to the FTC's long standing policy of analyzing the "net impression" of an advertisement, rather than individual claims made therein. Third, ERA believes that industry-based initiatives, such as enhanced self-regulation, consumer education, and continued industry-agency cooperation, will provide the most effective solutions to combat improper marketing practices in the weight loss industry.

## II. SCIENTIFIC PANEL BACKGROUND

The Workshop assembled a scientific panel to discuss the feasibility of eight weight loss claims.[1] Although the scientific panel consisted of a venerable cast of physicians and scientists, the apparent limited representation of the industry cannot go unnoticed. With only one expert from the industry among the ten panel participants, the credibility of the panel's findings was seriously undermined.

[1] The panel reviewed the following eight claims: "[1] The advertised product will cause substantial weight loss for all users; [2] the advertised product will cause permanent weight loss; [3] consumers who use the advertised product can lose substantial weight while still enjoying unlimited amounts of high calories foods; [4] consumers who use the advertised product can lose weight only from those parts of the body where they wish to lose weight; [5] the advertised product will cause substantial weight loss through the blockage of absorption of fat or calories; [6] consumers can lose substantial weight through the use of an advertised product that is worn on the body or rubbed into the skin; [7] consumers who use the advertised product can lose substantial weight without reducing caloric intake or increasing the level of physical

The findings of the panel should not be taken as conclusive. Although this was a distinguished group of experts, the haste in which opinions were formed could be considered ungrounded, the polling methods (including re-polling) could be seen as an effort by the Commission to extract the answers needed to support a campaign against certain weight loss products, and the nature in which the questions were posed leads one to be cautious of accepting the findings of the panel as reliable.

Often the panel tended to focus its attention on dietary supplements only, rather than the other products (such as devices, over-the-counter drugs, wraps, and patches) included in the definition of the "products" agreed to at the beginning. Also it was not clear whether or not low calorie diets were considered "products" under discussion.

The panel's haste in passing judgment on these claims with opinions and assumptions rather than scientific evidence was displayed when Mr. Almada, the only expert representing the industry, stated the following in response to discussion surrounding the claim "that an advertised product will cause permanent weight loss:"

> I think, in part, we're exercising an argument of ignorance because no one has done a long-term perspective trial evaluating an agent, an over-the-counter agent that's ingested in a solid dosage form, or applied to the skin. We can't answer that from a basis of logic and evidence. We're simply speculating.[2]

In addition, the polling of the panel was inconsistent, sometimes involving polling and re-polling the panel. The addition and deletion of modifiers from the questions often led to multiple polling. When asked to assess the plausibility of claims, the panel would switch from polling with the assumption that the poll was asking if it was "theoretically possible" in the future to "plausible with the current state of knowledge." These

---

activity; and [8] consumers who use the advertised product can safely lose more than three pounds a week

inconsistencies occurred throughout the panel presentation. This switch in polling obviously altered the outcome of the polls.

Finally, the claims in question were posed vaguely and panelists sometimes had problems interpreting the questions. Terms (e.g., "substantial weight loss") were never fully or consistently defined. Throughout the presentation panelists would decide to define terms and then later would determine not to use the definition. In several instances, the basis of the question was changed several times during the discussion and sometimes it was hard to understand exactly what version of the question upon which the panel was voting. The changing and inconsistent definitions suggest that the scientific panel recognized that the feasibility of the claims often depends on their context. Overall, the changing of the questions and definitions during the panel's discussion revealed a diversity of opinion about the interpretation of the eight weight loss claims at issue among the panelists. Consequently, this scientific panel's analysis of the claims identified by the Commission cannot and should not be taken as reliable.

## III. FIRST AMENDMENT DISCUSSION

### A. Introduction

ERA understands that the Commission is considering instituting or encouraging the media to perform a "quick look review" to screen out any advertisement as facially deceptive if it makes one or more of the eight claims the Commission has identified as presumptively false. Apparently, media examining advertisements that may make one of the presumptively false claims would be encouraged by the Commission to refer the advertisement to an organization such as the National Advertising Division of the Better

---

for a time period exceeding four weeks." Transcript at 17-18.
[2] Transcript at 42.

Business Bureaus, which would perform a quick look review to see if the advertisement should not be broadcast because it makes a presumptively false claim.

ERA respectfully notes that the Commission's "quick look" proposal to screen out these eight claims, without due regard to the context in which they were made, runs counter to the Commission's long-standing record of evaluating the "net impression" of an advertisement rather than individual claims made therein. This "net impression" standard is well established in both the Commission's policy and case law. As the Commission stated in its *Enforcement Policy Statement on Food Advertising*, "[i]n ascertaining the meaning of an advertisement, the Commission will focus on the ad's overall net impression."[3] Similarly, in its seminal FTC Policy Statement on Deception, the Commission stated:

> [T]he Commission will evaluate the entire advertisement in determining how reasonable consumers are likely to respond. Thus, in advertising the Commission will examine "the entire mosaic, rather than each tile separately."[4]

Administrative and judicial case law also illustrate the Commission's long-standing "net impression" policy. For example, in *Standard Oil of California*, the Commission explained that "[i]n evaluating advertising representations, we are required to look at the complete advertisement and formulate our opinions on them on the basis of the net general impression conveyed by them and *not on isolated excerpts*."[5] Similarly, in *Beneficial Corp v. FTC*, the Third Circuit noted in dicta the Commission's standard

[3] Federal Trade Commission, *Enforcement Policy Statement on Food Advertising 3* (1994).
[4] *FTC Policy Statement on Deception* 4 (1983), (quoting *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963)).
[5] *Standard Oil of California*, 84 F.T.C. 1401, 1471 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978), *reissued* 96 F.T.C. 380 (1980) (emphasis added).

analysis: "The tendency of the advertising to deceive must be judged by viewing it as a whole, *without emphasizing isolated words or phrases apart from their context*."[6]

With the Commission's potentially drastic policy shift in mind, ERA is deeply troubled by the serious constitutional questions that will undoubtedly arise if the Commission chooses to impose either a *de jure* ban on certain claims in weight loss advertisements or a *de facto* ban on such claims through the potential imposition of liability upon those who publish or disseminate such claims. In particular, ERA is concerned that the Commission's approach may constitute an invalid prior restraint on lawful commercial speech. ERA is further concerned that the Commission's approach to weight loss advertising may violate the First Amendment by regulating nonmisleading speech in a manner that is far more extensive than necessary to serve the Commission's stated purpose. Each of these specific concerns is addressed in turn below.

### B. The Commission's Proposed List of Prohibited Claims Constitutes an Invalid Prior Restraint on Lawful Commercial Speech.

The Commission's proposal to require pre-dissemination screening of weight loss advertisements by the media would essentially operate as a prior restraint because it would represent an attempt by an agency of the government to stop certain speech before that speech is disseminated. A prior restraint is defined as the government's "power to deny use of a forum in advance of actual expression."[7] However, there is a heavy presumption against the constitutional validity of any system of prior restraint because "a

[6] *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (emphasis added).
[7] *Southeastern Promotions v. Conrad*, 420 U.S. 546, 558-9 (1975).

free society prefers to punish the few who abuse the right of speech after they break the law rather than to throttle them and all others beforehand."[8]

Although the Commission's goal of reducing the dissemination of deceptive weight loss advertising is certainly one that the ERA supports, ERA is extremely concerned that the "blacklisted claims" mechanism through which the Commission apparently plans to seek its goal constitutes unlawful prior censorship. In *Southeastern Promotions*, the Supreme Court recognized that "[i]t is difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."[9]

To be lawful, a prior restraint must: (1) fit within one of a few narrowly defined exceptions to the prohibition on prior restraints; and (2) must be accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech.[10] Although the Supreme Court has suggested that commercial speech may fall into an exception for purposes of (1) above,[11] it is extremely clear that any such prior restraints must "take place under procedural safeguards designed to obviate the dangers of a censorship system."[12] The Supreme Court has held that a system of prior restraint:

> runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt and final judicial determination must be assured.[13]

---

[8] *Id*.
[9] *Id*.
[10] *See Id*.
[11] *See Central Hudson* (*Gas & Elec. Corp. v. Pub. Svc. Commun*, 447 U.S. 557, 563 (1980).
[12] *Southeastern Promotions*, 420 U.S. at 559.
[13] *Id*.

Clearly, the case law demonstrates that prior restraints on speech are to be used by the government only as a last resort and only with full and appropriate procedural safeguards.

Even a fast track review to determine whether an advertisement is facially deceptive because it makes one or more of the eight claims the Commission has identified as presumptively false will chill the media's willingness to carry any weight loss product advertising. Such a process will impede the free flow of information provided to consumers for too many legitimate weight loss products, because the media is likely to simply reject such advertisements rather than going through the Commission's review process. Moreover, this process would be impractical, given the fast pace typical of advertising production and placement in the media industry.

Requiring the media to pre-screen for the Commission's specified weight loss claims poses a threat to the freedom of speech protections guaranteed for legitimate commercial speech under the First Amendment. Therefore, a cooperative effort between industry and the Commission to develop voluntary industry guidelines and increased educational efforts will better serve marketers of legitimate weight loss products, ERA, and other industry members, as well as consumers.

### C. The Commission's Proposed List of Prohibited Claims Constitutes Excessive Regulation of Nonmisleading Speech

As an initial matter, we note that in *Thompson v. Western States Medical Center*,[14] the Supreme Court recently reaffirmed that commercial speech is protected by the First Amendment:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and

[14] 535 U.S. 357, 122 S.Ct. 1497 (2002).

> information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.[15]

Therefore, weight loss advertisements, like other speech that "proposes a commercial transaction," are entitled to protection under the First Amendment.

The applicable legal standard for the regulation of commercial speech under the First Amendment was set out by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*.[16] The four-step *Central Hudson* test first asks whether the commercial speech involves unlawful activity or is inherently misleading. If the speech in question is either unlawful or inherently misleading, then the First Amendment does not protect it. However, if the speech in question involves lawful activity and is not inherently misleading, then the government may only regulate the speech if the asserted governmental interest is substantial, the regulation directly and materially advances the government interest asserted, and the regulation is no more extensive than necessary to serve the government's asserted interest.[17] If a government regulation fails on any of these grounds, then the regulation violates the First Amendment.

As the advertising of weight loss products is obviously a lawful activity, the first substantive question under the *Central Hudson* test is whether the advertising claims in question are inherently misleading. If speech is not misleading, then it is clearly protected by the First Amendment. Moreover, we note that courts have been reluctant to

---

[15] *Id*. at 1503.
[16] 447 U.S. 557 (1980).

find that commercial speech is inherently misleading.[18] In *In re: R.M.J.*, the Supreme Court stated that "the States may not place an absolute prohibition on . . . potentially misleading information. . . if the information may also be presented in a manner that is not deceptive."[19]

A list of weight loss advertising claims that the Commission considers to be inherently deceptive and, therefore, *per se* illegal would appear to constitute precisely the type of absolute prohibition that was deemed improper by the Supreme Court in *In re R.M.J*. The general axiom that a specific statement may create a misleading claim in one context and yet create a truthful claim in another context is particularly true with respect to advertisements for weight loss products and services.

Moreover, although the Commission Staff attempted to limit the focus of the science panel discussion of its November 19, 2002 Workshop to specific types of weight loss products, many of the weight loss products marketed today are complete weight loss systems that include diet components, exercise components, and dietary supplement components. Other weight loss products are advertised specifically for use with particular diet and/or exercise programs. Indeed, a weight loss program based on a low-calorie diet combined with an increase in exercise and a dietary supplement for nutritional support could substantiate claims that it would cause a substantial amount of weight loss for all users (Claim 6) or result in permanent weight loss for individuals who incorporate those elements into their lifestyles (Claim 7). Therefore, claims made in

---

[17] *See*, *e.g.*, *Central Hudson*, 447 U.S. at 564; *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Western States*, 122 S.Ct. at 1504.
[18] *See*, *e.g.*, *In re R.M.J.*, 455 U.S. at 206; *Pearson v. Shalala*, 164 F.3d 650, 655-660 (D.C. Cir. 1999).
[19] *In re R.M.J.*, 455 U.S. at 203.

weight loss advertisements are not inherently misleading, and in fact may be presented in a manner that is non-deceptive.

Given that claims for weight loss products and services would almost certainly be deemed not to be inherently misleading by the courts because of the complex claim interpretation and substantiation issues involved, the analysis moves to the second step of the *Central Hudson* test: requiring the government to show that it has a substantial interest that justifies the regulation. While it is true that the courts have generally recognized the government's interest in ensuring that consumers are not misled,[20] the Supreme Court has also stated that the "First Amendment directs the [Court] to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[21]

The third and fourth steps of the *Central Hudson* test, which complement one another, ask whether the regulation directly advances the government's interest in a manner that is no more restrictive than necessary to serve the government's purpose.[22] A *de jure* or *de facto* regulation or policy statement by the Commission prohibiting certain specific weight loss advertising claims would greatly exceed the level of regulation necessary to achieve the Commission's goal of ensuring that consumers are not misled about the benefits of weight loss products. In *Pearson*, the Supreme Court stated that "it is clear then, that when the government chooses a policy of suppression over disclosure -- at least where there is no showing that disclosure would not suffice to cure

[20] *See Pearson*, 164 F.3d at 655.
[21] *Western States*, 122 S.Ct. at 1508 (quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 769 (1976)) (internal quotations omitted).
[22] *See Central Hudson*, 447 U.S. at 563; *Western States*, 122 S.Ct. at 1504.

misleadingness -- government disregards a 'far less restrictive' means."[23] In the instant situation, ERA is alarmed that the Commission appears to be choosing a policy of suppression over disclosure even though it is virtually impossible to analyze whether a disclosure would "suffice to cure misleadingness" without reviewing specific advertisements in context.

## IV. ERA'S PROPOSALS TO COMBAT DECEPTIVE ADVERTISING OF WEIGHT LOSS PRODUCTS

ERA shares the Commission's concerns about improper advertising and marketing of weight loss products and reinforces its commitment to work with the Commission through enhanced industry self-regulation, consumer education, and continued industry-agency cooperation to combat improper marketing practices.

ERA strongly believes that its members and other industry trade groups and members along with FTC can partner together on a number of proposed strategies to address the problem of deception in weight loss advertising without imposing agency guidelines that infringe on the protection provided to commercial speech by the First Amendment or deny consumers the opportunity to learn about innovative, legitimate weight loss products.

First, ERA firmly believes that industry self-regulation should be encouraged and that the existing case-by-case review of substantiation is the preferred method to police advertising. ERA's commitment to self-regulation of advertising is reflected by its insistence that its members live up to the ERA Marketing Guidelines. Similar to ERA's Marketing Guidelines, voluntary industry-wide guidelines should contain substantiation

[23] *Pearson*, 164 F.3d at 658.

and disclosure requirements to ensure that all statements made in weight loss advertisements are truthful and not misleading.

ERA believes that enhanced self-regulation can be highly effective in combating deceptive weight loss marketing and is preferable to rules or guidelines that identify a *per se* list of fraudulent weight loss claims, especially in an area where science is changing every day. ERA has already convened a broad industry meeting to explore ways in which voluntary self-regulation can be enhanced to help prevent unsubstantiated weight loss advertising claims.

Second, ERA continues to believe that consumer education is a powerful tool for combating fraudulent weight loss advertising claims. Accordingly, ERA proposes to increase consumer education efforts. For example, ERA is willing to work with its members and cooperate with other industry groups, such as the Ad Council, to facilitate the production and broadcast of public service announcements (PSAs) that educate consumers about weight loss. Additionally, such a PSA could direct consumers to a 1-800 number and a website link for additional information on weight loss products and claims. Similarly, ERA is willing to explore along with the Commission using other modes of communication to educate consumers about healthy weight loss. These other modes of communication could include a website to provide links to information educating consumers about weight loss and weight maintenance, and developing healthy weight loss brochures and package inserts.

## V. CONCLUSION

ERA believes that the proposals discussed above will be effective in combating deceptive weight loss marketing. ERA is committed to working with the Commission

and other members of the media industry to address concerns about and the proliferation of untruthful marketing of weight loss products to consumers.

Moreover, ERA believes that placing the responsibility on the media to pre-screen advertisements for deceptive weight loss claims is impractical and would unlawfully chill constitutionally protected advertising speech. There are hundreds of millions of commercials in the marketplace a year; thus, requiring the media to pre-screen all weight loss advertisements is too much of a burden on the industry and on free speech. Consequently, media outlets, to avoid any potential liability, are likely to avoid legitimate product advertisements that may appear to have one of the eight *per se* fraudulent claims, rather than face potential FTC scrutiny. Therefore, although ERA agrees with the Commission's view that its enforcement actions have not adequately reduced the amount of deceptive weight loss advertising in the marketplace, ERA is firmly convinced that imposing an obligation on the media to censor certain weight loss advertising claims is unconstitutional.

Respectfully submitted:

Elissa Matulis Myers, CAE
President & CEO
Electronic Retailing Association
2101 Wilson Boulevard, Suite 1002
Arlington, Virginia 22201
(703) 841-1751

Linda A. Goldstein
Charulata B. Pagar
Carolyn L. Hann
HALL DICKLER KENT GOLDSTEIN & WOOD LLP
909 Third Avenue

Jeffrey D. Knowles
Gary D. Hailey
William C. Waller
Stacia J. Borrello
VENABLE, BAETJER, HOWARD & CIVILETTI

New York, New York 10022
(212) 339-5400
Attorneys for
ELECTRONIC RETAILING
ASSOCIATION

1201 New York Avenue
Suite 1000
Washington, D.C. 2005-3917
(202) 962-4800
Attorneys for
ELECTRONIC RETAILING
ASSOCIATION