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WASHINGTON, D.C. 20230

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| Advertising of Weight Loss Products Workshop | ) | Comment P024527 |

**COMMENTS OF**
**THE MAGAZINE PUBLISHERS OF AMERICA, INC. AND**
**THE NEWSPAPER ASSOCIATION OF AMERICA**

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## INTRODUCTION

The Magazine Publishers of America, Inc. ("MPA") and the Newspaper Association of America ("NAA") respectfully submit the following comments on the Federal Trade Commission's November 19, 2002 Advertising of Weight Loss Products Workshop (the "Workshop").

As the Commission knows, the MPA and the NAA are the preeminent national trade associations representing the consumer magazine and newspaper industries respectively. The MPA currently has over 240 domestic members who collectively publish over 1,400 magazines. The NAA represents more than 2,000 newspapers in the United States and Canada that account for nearly 90% of the total daily newspaper circulation in the United States.

At the request of the Commission, representatives from the MPA and the NAA participated in the Workshop. Through their participation, the MPA and NAA sought to educate the Commission about some of the practical and legal difficulties associated with screening weight loss advertisements for veracity. Prior to the Workshop, the NAA also filed preliminary comments outlining its views on these issues and on the Commission's Report.

The purpose of these comments is to explain more fully the substantial constitutional, liability and economic concerns that the publishing industry has about the Commission's recent assertion that publishers can and should screen all weight loss advertisements for veracity. In aid of this examination, we will critically review both the substance of the Workshop and the contents of the Commission's *September 2002 Report on Weight Loss Advertising: An Analysis of Current Trends* (the "Report").

While these matters will be discussed in greater detail below, for the purpose of these comments, our concerns are perhaps best viewed through the prism of what the Commission intends to do, *i.e.* issue a list of eight claims that the Commission would like publishers to use in connection with screening weight loss advertisements for veracity.

(A copy of the aforementioned list was published in the September 20, 2002 Federal Register notice announcing the Workshop.) Since issuing a list of prohibited claims would undoubtedly result in the chilling of protected speech, constitute an unlawful prior restraint in the wake of the Commission's implied threats of prosecution for non-compliance, and subject publishers to exponential liability in consumer tort actions, the MPA and the NAA hope that after reading these comments the Commission will consider some of the alternatives we suggest in the Conclusion.

## COMMENTS

### A. Issuing a List of Prohibited Claims Will Impose Impermissible Burdens on the Media and Chill Protected Speech.

The Commission's proposed list is practically unworkable and legally impermissible because it contemplates use by qualified scientists who have no place in publishing. As the MPA and NAA made clear at the Workshop, newspapers and magazines cannot be reasonably expected to maintain the professional staff necessary to make decisions regarding what weight-loss claims are accurate based upon the evolving state of science. Only one publication maintains a staff that is dedicated to and capable of verifying the product claims made by its advertisers. This operation is essential to *Good Housekeeping*'s editorial mission and costs the magazine over $2.4 million a year – a figure which is more than the gross revenue of 90% of the magazines published in the United States. Transcript at 203. While the Commission might prefer to believe that publications do not have to incur a *Good Housekeeping* expense in order to get a *Good Housekeeping* result, the Commission must also realize that the more truncated and unprofessional a substantive ad review process becomes, the more likely it is to result in the censorship of legitimate advertising claims.

The Commission was advised at the Workshop that newspapers and magazines do not intend to "staff up" like *Good Housekeeping*. In all likelihood, the overwhelming majority of newspapers and magazines will continue to rely upon ad sales personnel –

publishers, associate publishers, ad salespersons, ad copy-readers – to look at advertisements briefly before publication to make non-scientific judgments about taste and appropriateness. And therein lies the problem – not only are ad sales personnel unqualified to make quick regulatory decisions based upon scientifically questionable information provided by federal regulators (the Commission's proposed list) but the fear that those regulators and the public at large can then seek legal recourse if they, as ad sales people, make a mistake on deadline with respect to a particular ad, cannot but lead to the censorship of *all* ads that have not been or cannot be completely verified.

The result with respect to the weight loss advertising category will be the elimination of advertisements for many legitimate products. More than 60% of the 300 ads the Commission surveyed in its Report contained no questionable claims whatsoever, *e.g.* claims on the Commission's list. Report at 30. However, these admittedly unobjectionable ads will never see the light of day if publishers decide that it is not worth taking a legal risk on an ad sales person's judgment concerning the veracity of scientific claims made in weight loss advertising. Although it is impossible to predict how many publishers might make such a decision, it is not hard to predict that smaller publishers may be financially compelled to opt for the safest course.

This suppression of valid advertising presents a problem of constitutional dimension because it will inevitably lead to the curtailment of legitimate reporting. Advertising revenues make it possible to investigate stories, to pay journalists, and to disseminate periodicals. Consequently, the First Amendment prohibits government from imposing economic burdens that fall disproportionately on a "limited group of publishers" that transmit a particular range of views, for such burdens threaten to dampen the discussion and development of particular issues. *Arkansas Writers' Project v. Ragland,* 481 U.S. 221, 229 (1987) (invalidating tax that applied only to a narrow segment of magazines depending on their subject matter). The Commission's proposal here would run afoul of this tenet. Ironically, it would eliminate valuable advertising in

precisely the publications that report most frequently and informatively on matters relating to healthy weight loss, small fitness and health-related publications.[1] In addition, the Commission's proposed list of prohibited claims will clearly have a disproportionate effect on those publications that either cannot afford to hire a staff of scientists like *Good Housekeeping* or that cannot afford to take a risk that their ad sales personnel might make some mistakes when evaluating the veracity of weight loss claims made in proposed advertisements. *See Grosjean v. American Press Co.,* 297 U.S. 233 (1936) (First Amendment prohibits discriminatory burden based on size of publisher); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575 (1983) (same).

But even if all publishers were able to sift through proposed weight loss advertising with an aim toward guaranteeing these ads' veracity, there still would be a chilling effect on protected commercial expression. Testifying before Congress, Albert Einstein stated, "The progress of science presupposes the possibility of unrestricted communication of all results and judgments – freedom of expression in all realms of intellectual endeavor." Mary M. Cheh, *The Progressive Case and the Atomic Energy Act: Waking the Dangers of Government Information Controls,* 48 Geo. Wash. L. Rev. 163, 206 n.282 (1980). Accordingly, it is "settled . . . that the First Amendment protects scientific expression and debate just as it protects political and artistic expression." *Universal City Studios, Inc. v. Corley,* 273 F.3d 429, 446-47 (2d Cir. 2001) (quoting *Board of Trustees of Leland Stanford Junior Univ. v. Sullivan,* 773 F. Supp. 472, 474 (D.D.C. 1991)). This means that the government may not force (or ask) private parties to suppress advertising that recites nonmisleading scientific expression.

Here, there is no question that the Commission's list of prohibited claims will lead to the suppression of nonmisleading weight loss advertising, which, like all

[1] According to the *National Directory of Magazines*, health and fitness magazines has been one of the fastest growing categories over the last twelve years. Between 1990 and 2002, over 191 new titles were published. Most of these titles have a circulation base of less than 100,000.

nonmisleading commercial speech, is entitled to First Amendment protection. The list is overbroad and scientifically dubious. *See* Appendix (analyzing proposed list of prohibited claims). Indeed, it seems extraordinary that the Commission has asked the media to do something that the Commission cannot do itself under the law, *i.e.* declare advertising claims false without any consideration of context. *See Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3rd Cir. 1976) ("the tendency of . . . advertising to be deceptive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context"); *Kraft, Inc. v. FTC,* 970 F.2d 311, 314 (7th Cir. 1992) (Commission must consider "overall impression of ad" in determining whether it is deceptive); *Charles of the Ritz Distributors Corp. v. FTC,* 143 F.2d 676 (2d Cir. 1944) (same).

Given the obvious and pernicious chilling effects that content-specific restrictions have on protected speech, it is no surprise that courts have struck down other types of government-generated lists. *See, e.g., American Booksellers Ass'n v. Hudnut,* 771 F.2d 323, 325, 328 (7th Cir. 1985) (list of types of depictions of women cannot automatically be deemed obscene without considering the speech "as a whole"). Such "dirty poses" and "dirty claims" lists also raise due process concerns, for the Fourteenth Amendment forbids the government from adopting "irrebutable presumptions" that certain fundamental rights (such as free speech) may be curtailed when those presumptions are not "necessarily and universally true in fact" and individual determinations are possible. *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 644-45 (1974).

If the Workshop demonstrated anything, it was that the Commission's proposed list of prohibited claims were not "necessarily and universally" false in fact.[2] Indeed, it is

[2] At the Workshop, nine scientists, researchers and physicians spent close to three hours discussing various versions of the claims on the Commission's list. During the course of their discussion, the panelists repeatedly emphasized the need to examine each claim in context. More important, at least one panelist stated that *each* of the claims was either true or could be true. The panelists' responses to each claim are discussed in the Appendix.

hard to imagine how any list on something as fluid as the science of weight loss could possibly meet such a standard. Perhaps the framers of the FTC Act recognized this same phenomenon when they declined to pursue narrowly defining false advertising back in 1914. The Senate Committee "gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail," but it decided not do so because "after writing 20 of them into the law it would be quite possible to invent others." S. Rep. No. 75-221 (1937), *reprinted in* Dunn, Wheeler-Lea Act: A Statement of Its Legislative Record 138 (1987) (quoting Senate Report of Committee on Interstate Commerce (June 13, 1914)). When Congress amended the Act in 1938, the FTC itself agreed that:

> it would not be practicable to attempt to define unfair methods or unfair or deceptive acts and practices because such unfair methods and practices are constantly changing. . . . [T]he danger of defining "deception" lies in the limitation of the definition, and in the fact that it is always possible for the human mind to conceive a method of deception not covered by the limitation resulting from the definition.

*To Amend the Federal Trade Commission Act: Hearings on S. 3744 Before the Senate Interstate Commerce Committee,* 74th Cong. 79-80 (1936) (statement of R.E. Freer on behalf of FTC). Taking an example from the Workshop, if the Commission banned claims that diet products "will cause substantial weight loss for all users," advertisers could convey essentially the same message with impunity simply by removing the word "all." Transcript at 33. If laws, regulations, or guidelines are to be successful in deterring advertising in which persons have a strong economic interest, they must be broadly phrased standards, not narrowly targeted prohibitions.

But while setting broad standards is preferable, and generally permissible, in dealing with *advertisers*, it returns us to the original problem with requiring the *media* to screen advertisements: it effectively imposes on publishers a duty to investigate. Determining whether a diet product advertisement violates a certain standard – for

instance, whether it promises unduly disproportionate weight loss from certain parts of the body – requires at least some technical analysis. The Workshop's need for the one-half day session on the science of weight loss vividly illustrated that it is not common knowledge whether even the most extraordinary claims in this area have some basis in reality. But hardly any magazines or newspapers (if any) have staff scientists who can assess the veracity and scientific foundation of diet claims.

It does not solve this problem to posit, as some participants in the Workshop did, that the media would be responsible for screening out only those advertisements that "on their face" are deceptive. An "on their face" standard works in the context of identifying advertisements based on their subject matter, such as tobacco products, or on their photographic depiction, such as excessive nudity. Many magazines and newspapers utilize such screening criteria. An "on their face" standard may also work when it comes to proffered advertisements that "clearly" propose illegal activity. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376 (1973) (upholding prohibition against the media publishing advertisements "clearly" proposing to discriminate in employment on basis of race); *United States v. Hunter,* 459 F.2d 205 (4th Cir. 1972) (same with regarding to housing discrimination); *Braun v. Soldier of Fortune Magazine,* 968 F.2d 1110, 1120 (11th Cir. 1992) (upholding imposition of liability against magazine for publishing advertisement for "gun for hire" because it "clearly" offered to commit murder). In these instances, a person reviewing a proffered advertisement can determine whether to reject it simply by looking at it and noticing whether it addresses a certain topic.

But any attempt to screen advertisements for their *veracity* is fundamentally different. Simply reading a scientific claim regarding the effectiveness of a diet product is not enough to determine whether it is deceptive. One must investigate the claim or bring independent expertise to bear. And that, as we have said, is what most magazines

and newspapers cannot afford to do – and what the First Amendment does not permit the Commission to require.

Finally, to the extent the Commission believes that even if its proposal results in the suppression of nonmisleading weight loss advertising, that this is a legitimate means of advancing public health, the Commission is incorrect. The Supreme Court's decision in *Central Hudson Gas & Electric Corp. v Public Service Comm'n*, 447 U.S. 557 (1980), makes it clear that such a governmental interest is insufficient to censor legal speech. Proposed restrictions on commercial speech can be no broader than necessary to achieve the government's stated goal. *See id.* at 566. Accordingly, the Court recently held that suppression of tobacco advertising is too draconian a step to protect public health. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001); *see also Greater New Orleans Broadcasting Ass'n. v. United States,* 527 U.S. 173 (1999) (holding FCC rule restricting private casino advertising violates First Amendment because it "sacrifices an intolerable amount of truthful speech about lawful conduct when compared to . . . the social ills that one could reasonably hope such a ban to eliminate"). Instead of suppressing legitimate advertising for controversial products, the government must restrict itself to counter-speech and allow consumers to decide for themselves.

### B. Issuing a List of Prohibited Claims, Along With Implied Threats of Prosecution for Non-Compliance, Constitutes a Prior Restraint on Free Speech.

Prior to the Workshop an FTC Commissioner publicly complained that "[o]ur law enforcement experience suggests that some media members are not paying close enough attention to the [weight loss] ads that are being run." She went on to warn that "[the FTC] is looking broadly at the question of who has liability for deceptive advertising claims" and "caution[ed] those that assume that they are immune to an enforcement action as long as they don't sell dangerous products or cancer cures." *See Combating Deception in Dietary Supplement Advertising,* Remarks Delivered to the 45th Annual

Educational Conference of the Food and Drug Law Institute, Washington, D.C., April 16, 2002.

At the Workshop, the Commission actively explored whether providing the media with formal notification of allegedly false claims (*i.e*. issuing its list of prohibited claims) could serve as a predicate to a successful enforcement action. Transcript at 214-15. In response to the query, the only legal expert the Commission invited to the Workshop concluded "formal notification would make some sort of FTC action easier." *Id*. at 215.

Following the Workshop, *The Wall Street Journal* reported on page one that "[the] Commission is pressing cable channels, newspapers and magazines to reject false and misleading diet and health advertising – and making veiled threats of legal action if they don't." *See* Wilke, John "Chairman Wants Papers, TV Accountable For Misleading Ads," *The Wall Street Journal*, November 20, 2002. In a follow up article in *USA Today* the Commission said that, while it is "premature," suing media outlets that refuse to screen false advertisements would be among the Commission's options. John Davidson, "FTC Pressures Media To Reject Bogus Diet Ads," *USA Today*, November 21, 2002.

Taken together, the Commission's statements before, during and after the Workshop constitute an implied threat that the Commission will take law enforcement action against the media if it fails to screen weight loss advertisements to the Commission's satisfaction. If the Commission goes forward and disseminates its list of prohibited claims without dispelling this threat, then the Commission's actions will constitute an unconstitutional prior restraint on speech.

"A prior restraint occurs . . . when there is an official restriction imposed upon speech in advance of publication." *Forbes v. City of Seattle,* 785 P.2d 431, 435 (1990). Such restraints, by definition, bear a heavy presumption of unconstitutionality because of their propensity to suppress or chill protected expression. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976).

The Supreme Court made it clear in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), that a governmental agency need not take official action or issue formal rules or opinions in order to trigger the prior restraint protections of the First Amendment. There the Court confronted a state commission's practice of sending notices to booksellers that it determined were selling books that were obscene. Although the state commission argued that its actions were constitutional because its notices requested only voluntary compliance, the Court explained that "informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief" on First Amendment grounds. *Id.* at 67. The Court then held that the commission's notices were unlawful prior restraints because these "informal" communications carried an implicit threat that the State would pursue formal sanctions if the recipients refused to comply with them.

The analogy between the facts in *Bantam Books* and the Commission's plan to send a list of allegedly false advertising claims to publishers is obvious. As the Supreme Court has made clear, characterizing guidelines or notices as "voluntary" does not eliminate the fundamental constitutional problem created by government issued content-specific restrictions on speech. Indeed, other courts following *Bantam Books* have invalidated similar informal attempts to suppress speech. *See Playboy Enters. v. Meese,* 639 F. Supp. 581 (D.D.C. 1986) (letters threatening to list distributors as purveyors of indecent material); *ACLU v. City of Pittsburgh,* 586 F. Supp. 417 (W.D. Pa. 1984) (letters to newsstands urging them to remove certain indecent magazines from stands in order to avoid need for prosecution).

The key element of an unconstitutional system of informal prior restraint, as the D.C. Circuit has explained in a case involving the FCC, is that "the scheme in practice causes a speaker of reasonable fortitude" to suppress protected expression in order to steer clear of a threat of prosecution. *Action for Children's Television v. FCC,* 59 F.3d 1249, 1261-62 (D.C. Cir. 1995); *see also id.* at 1263-64 (Edwards, C.J., concurring).

That is exactly what would happen in this instance. As stated more fully in Section A, magazines and newspapers are not equipped to determine whether scientific weight loss claims are substantiated or deceptive. The most that ad sales people are reasonably capable of doing on deadline is to examine an advertisement's facially apparent characteristics, such as whether it clearly proposes illegal activity or complies with the magazine's or newspaper's standards of taste. Consequently, if the Commission urges publishers to comply with a list of guidelines, the probable reaction of most magazines and newspapers will be to cease printing advertisements for diet products altogether. This categorical decision will result in the self-censoring of a wide swath of protected speech including the approximately 60% of all diet product advertising that the Commission has deemed valid.

Even if some magazines and newspapers decide still to accept some diet product advertising, they undoubtedly will reject some constitutionally protected advertisements for fear of sanctions. The Commission's guidelines, as we understand the proposal offered at the Workshop, would not identify particular advertisements as deceptive. Rather, they would list certain types of claims that the Commission has deemed almost certainly deceptive. Publishers still would have to deduce whether specific advertisements (i) fell within the guidelines and (ii) if so, were actually deceptive. The process of making these conjectures under pain of sanctions unavoidably would cause publishers to resolve doubts in favor of rejecting weight loss advertisements. Publishers would assume that more advertisements fell under the guidelines than really did. And they would refuse to accept any advertisement containing the prohibited claims, regardless of whether the claims in certain ads, read in context, actually were not deceptive.

### C. The Commission Lacks Statutory Authority to Sanction the Media for False Advertising.

The Commission's implied threats of prosecution for non-compliance with its censorship guidelines is particularly puzzling given the Commission's lack of statutory authority to sanction the media for false advertising.

To our knowledge, the Commission has not yet indicated where it derives the power to sanction the media for failing to screen advertisements for veracity. But we have serious doubts that the FTC Act gives the Commission the authority to do so. Although two provisions of the FTC Act permit the Commission to seek monetary penalties against persons who "disseminate" deceptive advertisements, 15 U.S.C. §§ 53 and 54, neither of these provisions' legislative or enforcement histories indicates that it may be invoked against publishers.

#### 1. 15 U.S.C. § 54 (Section 14 of FTC Act)

Section 54, which allows the imposition of criminal fines for false advertising, provides a clear exemption to the media. It explicitly states that no such fines may be levied against any "publisher," "radio-broadcast licensee" or similar media entity solely for disseminating an unlawful advertisement. 15 U.S.C. §54(b). This provision originated in a bill in the mid-1930's proposing amendments to the Food and Drug Act. A Senate report to that bill explained that:

> Publishers, radio broadcast licensees, and other media for the dissemination of advertising are not in many instances in a position to know the nature of the goods they advertise nor can they be expected to maintain the necessary laboratory equipment and staff of technicians to determine the facts. Accordingly, [section § 54(b)] will exempt such persons from liability under the law and place the responsibility where it rightly belongs, on the manufacturer or dealer of the advertised product who is in a position to know, and should know, whether the representations concerning his goods are true or false.

S. Rep. No. 74-646 (1935), *reprinted in* Dunn, Federal Food Drug and Cosmetic Act: A Statement of Its Legislative Record 488 (1987). When Congress moved these false advertising provisions from the food and drug bill into the bill proposing amendments to

the FTC Act, it reiterated that the media exemption in what became Section 54(b) was meant "to avoid the unwarranted hardship on those persons who may not be in a position to determine the falsity of the advertisements, and where ample recourse may be obtained against the persons primarily responsible for the false advertisements and who profit from the sale of the commodities falsely advertised." Conference Report No. 75-1774 (1938), *reprinted in* Dunn, Wheeler-Lea Act: A Statement of Its Legislative Record 322 (1987). It comes as no surprise, therefore, that Section 54 has never been invoked against the media.

**2. 15 U.S.C. § 53 (Section 13 of FTC Act)**

The clarity of the exemption provided to the media in Section 54(b) and the common sense rationale Congress provided for insulating the media against government prosecution suggest that it would be an extraordinary expansion of the Commission's authority to seek civil penalties against the media under Section 53. By operation of Section 52(b) of the Act, Section 53 allows the Commission to recover equitable monetary civil penalties for violations of the general prohibition against false advertising. Since these civil penalties often exceed the criminal penalties listed in Section 54, it certainly would be anomalous for Congress to have allowed the Commission a loophole to levy greater penalties against the media under Section 53 then it prohibited the Commission from levying under Section 54. Nevertheless, since Section 53 does not expressly exclude media entities from its ambit, it is necessary to inspect the history of the FTC Act to determine whether Congress intended to allow the Commission to prosecute the media for false advertising at all.

The history of the FTC Act confirms that Congress never intended to allow the Commission to seek civil penalties against the media. When Congress was considering the amendments to Section 45 of the FTC Act that codified the Commission's right to punish false or deceptive advertising, the media expressed concern that the amendments, unlike the food and drug bill that created Section 54, did not expressly absolve them of

responsibility for publishing false or misleading advertisements. Senator Wheeler, the Chairman of the Committee on Interstate Commerce and co-sponsor of the amendments, however, assured media representatives that "[t]here is nothing in this act that seeks to hold newspapers responsible for those things at all." *To Amend the Federal Trade Commission Act: Hearings on S. 3744 Before the Senate Interstate Commerce Committee,* 74th Cong. 68-69 (1936) (hereafter "*Senate Hearings*"). In over three years of legislative hearings and debate on the amendments, no report or congressman ever suggested otherwise.

What is more, the Commission repeatedly told Congress during this period that it "never has issued a complaint against any newspaper for carrying a false or misleading advertisement" and suggested that it lacked the power to do so. *Amendment to Federal Trade Commission Act: Hearings on S. 3744 Before the House Committee on Interstate Commerce,* 74th Cong. 75 (1936) (statement of Ewin L. Davis, Commissioner of FTC); *see also id.* at 91 (memorandum of Charles H. March, Acting Chairman of FTC) ("No newspaper, small or large, has ever been so cited" by Commission . . . . "[N]o complaint or cease-and-desist order was ever issued against a newspaper for carrying [a false or misleading] advertisement. No newspaper has ever been required by order of the Commission to discontinue such advertising"). The FTC Commissioner continued: "In other words, our procedure is against the advertiser, and, of course, we realize that if we stop the advertiser from advertising there is not any danger of the newspapers continuing to carry the advertising free of charge." *Id.* at 76.

From this and other testimony, congressmen deduced that the Commission's "action on account of false advertising is directed principally against the disseminators of the advertising, the people delivering the advertising to the country newspapers, *like the food and drug bill* . . . provide[s]." *Id.* at 71 (statement of Representative Cole) (emphasis added). The Commission reassured Congress that this understanding was correct, stating that "the amendment does not change in any respect any legal

responsibility that may now attach to magazine or newspaper publishers." *Senate Hearings,* at 82 (statement of R.E. Freer, member of FTC, presenting statement on behalf of Commission). The Commission's effective disavowal of the authority to seek monetary penalties against publishers – just like the FDA's repeated disavowals of jurisdiction concerning tobacco products – underscores the fact that Congress did not intend to grant the Commission the discretion to seek to impose such penalties against publishers.[3] That the Commission has operated for more than sixty years without seeking such authority reaffirms its understanding of the limited scope of its enforcement authority.[4]

### D. Assuming a Duty to Screen Advertisements for Veracity Would Subject Publishers to Exponential Tort Liability.

Even if the Commission withdrew its threats of prosecution and asked publishers to voluntarily use its list of prohibited claims to screen weight loss advertisements for

[3] It is implausible that Congress would have left the major issue of whether the FTC Act permits the Commission to regulate the publishing industry to the Commission's discretion. As the Supreme Court recently explained in holding that the FDA, despite its apparently broad statutory mandate, lacked the authority to regulate tobacco products, that "[i]n extraordinary cases, . . . there may be reason to hesitate" before concluding that Congress intended, without explicitly saying so, to delegate broad and important powers to an administrative agency. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159 (2000). Justice Breyer likewise has explained that "[a] court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin L. Rev. 363, 370 (1986). Indeed, "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially [regulated] to agency discretion." *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,* 512 U.S. 218, 231 (1994).

[4] The Commission's apparent inability to invoke Section 53 to seek monetary restitution from media entities also would foreclose any attempt to utilize Section 45(m) to impose similar fines. Section 45(m) permits the Commission to seek fines against anyone who violates the terms of a cease-and-desist order. But that remedial mechanism, like Section 53, is limited by the scope of the Commission's jurisdiction under Section 45.

veracity, the Commission would be asking publishers to assume a duty that is not required by law. Courts have firmly rejected the notion that publishers have a duty to screen advertisements *at all*, much less than for substantive veracity. *See generally* Am. Jur. 2d, Advertising § 12 (1989); *Boyd v. Keyboard Network Magazine,* 2000 WL 274204 (N.D. Cal.), *aff'd,* 246 F.3d 672 (9th Cir. 2000) (magazine owes no duty to ensure veracity or completeness of advertisements); *Eimann v. Solider of Fortune Magazine, Inc*., 880 F.2d 830, 836 (5th Cir. 1989) (not only is there no duty investigate advertisements but there is no duty for publishers to refuse to run ads that "reasonably could be interpreted as an offer to engage in illegal activity" based on their words and context); *Braun v. Solider of Fortune Magazine, Inc*., 968 F.2d 1110 (11th Cir. 1992) (magazine has no duty to investigate whether an advertisement could lead to crime; it may be held liable only if an ad "on its face" solicits murder); *Pressler v. Dow Jones & Co*., 450 N.Y.S.2d 884 (N.Y. App. 1982) ("newspaper has no duty to investigate each of the advertisers who purchase space in its publication"); *Pittman v. Dow Jones & Co.,* 622 F. Supp. 921 (E.D. La.), *aff'd,* 834 F.2d 1171 (5th Cir. 1987) ("a newspaper has no duty, whether by law or by contract, to investigate the accuracy of advertisements placed in it which are directed to the general public, unless the newspaper undertakes to guarantee the soundness of the products advertised"); *Stoianoff v. Gahona*, 248 A.2d 525 (N.Y. App. Div. 1998) (same); *Suarez v. Underwood*, 426 N.Y.S.2d 208 (N.Y. Sup. Ct. 1980) (newspaper has no duty to investigate veracity of advertising claims); *Walters v. Seventeen Magazine,* 195 Cal. App. 3d 1119 (1987) (magazine has no duty to investigate advertisements); *Vaill v. Oneida Dispatch Corp.,* 493 N.Y.S.2d 414, 415-16 (N.Y. Sup. Ct. 1985) (newspaper has no duty to verify either author or contents of classified ads); *see also* N.Y. Gen. Bus. Law. § 350-f ("Nothing in this article [prohibiting deceptive advertising] shall apply . . . to any publisher or printer of a newspaper, magazine, or other form of printed advertising.")

The compelling societal and commercial reasons against holding publishers liable for advertising claims were perhaps best articulated by the court in *Yuhas v. Mudge*, 322 A.2d 824 (N.J. App. Div. 1974). In *Yuhas* two young boys were injured by fireworks their father purchased pursuant to an advertisement in *Popular Mechanics*. The boys and their father claimed that the Hearst Corporation, publisher of *Popular Mechanics*, owed a duty to the public to make sure that the fireworks advertised in *Popular Mechanics* were safe. In rejecting their claim, Judge Harlan said:

> To impose the suggested broad legal duty of liability upon publishers of nationally circulated magazines, newspapers and other publications, would not only be impractical and unrealistic, but would also have a staggering effect on the commercial world and our economic system. For the law to permit such exposure to those in the publishing business who in good faith accept paid advertisements for a myriad of products would open the doors "to liability in an indeterminate amount for an indeterminate time to an indeterminate class."

*Id*. at 825, *quoting Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 (Ct. App. 1931).

By asking publishers to assume a duty to screen weight loss advertisements for veracity – a duty that conclusively does not exist at common law – the Commission is in fact asking publishers to expose themselves "to liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* This is something that publishers cannot do.

If publishers were to attempt to warrant that advertising claims are true, they would lose many of the protections articulated above. Even when an entity lacks a duty to act in a certain way, it is axiomatic that if the entity nevertheless voluntarily acts in that manner, it must exercise reasonable care in doing so, and that breaches of such voluntarily assumed duties can create liability to third parties. *See* American Law Institute, Restatement of the Law (Second) §§ 323 & 324A (1965) (summarizing cases to this effect). If a company, for example, voluntary undertakes to warn the public of a certain type of unsafe condition, then negligently failing to do so can result in liability to

anyone who is injured. *Id.* § 324A, cmts. d & e. Thus, courts have noted that publishers that voluntarily undertake to screen, endorse, or guarantee advertisements may be held liable for negligently doing so. *See Yuhas*, 322 A.2d at 826 (magazine publisher has no duty to investigate advertised product *unless* it undertakes to guarantee, warrant or endorse the product); *Pittman*, 622 F. Supp. at 922 (newspaper can assume a duty to investigate if it undertakes to guarantee the soundness of the products advertised); *Winter v. G.P. Putnam's Sons*, 938 F. 2d 1033, 1037 (9th Cir. 1991) (publisher had no duty to investigate the contents of the books it published but could assume such a duty by attempting verification); *Hanberry v. Hearst Corp*., 276 Cal. App. 2d 680, 683-84 (1969) (*Good Housekeeping* held liable for defective product because it had given the product its *"Good Housekeeping Consumer's Guaranty Seal*"); *Libertelli v. Hoffman-La Roche, Inc.,* 1981 U.S. Dist. LEXIS 11049 (S.D.N.Y. Feb. 23, 1981) (no legal duty rests upon publisher to verify advertising claims *unless* publisher undertakes to warrant or guarantee the product); *Stoianoff,* 248 A.2d at 526 (same); *Alm v. Van Nostrand Reinhold Co.,* 480 N.E. 2d 1263 (Ill. App. 1985) (publishers normally not held liable for passively printing product information supplied by third parties but result could change if publisher sought to endorse or warrant product's effectiveness).

Applied to the present situation, this means that if publishers assumed a duty to ensure the veracity of weight loss advertising by using the Commission's list of prohibited claims and subsequently breached that duty by failing to effectively weed out all of the claims on the list from diet product advertisements, publishers might then be held liable to consumers who did not achieve the weight loss benefits promised by such ads. The claim would be one of straightforward negligence. Consumers would claim that magazines assumed a duty to publish accurate diet product advertising; that the magazines could foresee that consumers would rely on this screening process; that magazines breached its assumed duty to the extent that it failed to weed out all advertisements that were covered by the Commission's guidelines; and that the

consumers were harmed as a result of this breach. The potential for class actions is obvious.

Therefore, accepting the Commission's proposal to voluntarily assume a duty to investigate weight loss advertisements for veracity would subject publishers to potentially exponential tort liability. As the Court in *Walters* stated:

> [Exposure to] [s]uch a tort[s] would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous cost of such groups, along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise for lack of revenue. Others would comply, but would raise their prices beyond the reach of the average reader. Still others would be wiped out by tort judgments, never to revive. Soon the total number of publications in circulation would drop dramatically.

195 Cal. App. 3d at 1122. Indeed, this exposure could extend not only to the purchasers of diet products but also to purchasers of other advertised products. The theory of liability would be that because publishers have accepted a duty to screen advertising for certain allegedly deceptive and dangerous products, *e.g.* weight loss products, they should also be responsible for failing to screen advertising claims for other more provably dangerous products, such as pharmaceuticals for morning sickness that may cause birth defects – or even sport utility vehicles that have a tendency to flip over. Regardless of whether such lawsuits outside the realm of diet products ultimately would be successful, we can be sure of one thing: they will come. And once they come, they will be extremely costly to defend against.

While it is ironic that publishers' potential liability increases in proportion to how actively they regulate advertising content, it is a risk that publishers cannot afford to transform into a reality by accepting the Commission's proposal to screen weight loss advertising for veracity.

## CONCLUSION

Given that issuing a list of prohibited claims would undoubtedly result in the chilling of protected speech, constitute an unlawful prior restraint and expose publishers to potentially exponential tort liability, the MPA and the NAA strongly urge the Commission to reconsider pursuing this unprecedented course of action. There are other more effective means to combat weight loss fraud than assigning the Commission's regulatory role to the media. Indeed, the Commission identified three of them at the Workshop: more vigorous law enforcement; consumer education; and, industry self-regulation. Transcript at 6.

The fact that the number of advertisements for all categories of weight loss products, other than dietary supplements, actually *decreased* in the last decade suggests that the Commission's law enforcement efforts can produce the desired result when targeted appropriately.[5] Given the increased number of cases the Commission has

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[5] In the "Historical Comparison: 1992/2001" section of the Report, the Commission states that the number of distinct weight loss advertisements appearing in magazines increased 212% between 1992 and 2001. However, the actual increase in advertisements was a modest 11, from 9 distinct advertisements in 1992 to 20 in 2001. Report at 21. Moreover, for all products except dietary supplements, advertising actually decreased from 1992 to 2001, with 7 products advertised in 1992 and only 6 products advertised in 2001. *See* Table 10: Product Comparison, Report at 21. The only increase in advertisements from 1992 to 2001 occurred for dietary supplements, which went from 0 to 12. *Id.* The MPA and NAA respectfully submit that this increase in advertisements for dietary supplements is directly related to the passage of the Dietary Supplement Health and Education Act of 1994 ("DSHEA"), not to increased greed on the part of publishers. Prior to 1994, dietary supplements were subject to pre-market approval by the FDA. After 1994 they were not. As the Commission notes in a different section of its Report, the result of this "deregulation" has been a proliferation of new dietary supplement products. Report at 28.

Regrettably, it does not appear that the Commission's law enforcement efforts have kept pace with the influx of dietary supplements into the post-DSHEA market. Although the Commission frequently cites the "unprecedented number of law enforcement actions" it has brought against weight loss advertisers, out of the 81 actions the Commission brought in the 1990s, less than one-half of them were taken against dietary supplement manufacturers. The remaining majority of cases were brought against other manufacturers, such as leading commercial weight loss centers and exercise equipment retailers, an area of advertising that the Report shows has not grown since 1990.

brought against diet supplement manufacturers since the Workshop, it appears that the Commission agrees with this analysis. Over the last two months alone the Commission has brought successful actions against Mark Nutritionals, Inc. and Blue Stuff Inc. and has filed a complaint against Slim Down Solution. If this level of enforcement continues, we expect that the Commission will better its historical record of bringing less than one-half of its total cases against the only category of weight loss products that has increased over the last decade. Since the publishing industry has always concurred with the Commission's view that "the ultimate decision of whether to disseminate a particular advertisement rests with the publisher," Report at 32, the industry supports the Commission's enforcement efforts in this regard.

With respect to consumer education, the bulk of it appears to have been directed at persuading the media to screen weight loss advertisements for veracity. Report at 30. This initiative has been largely unsuccessful due to the fact that the media cannot assume a duty to screen such advertisements for veracity for all of the reasons set forth above. The media can, however, continue to provide timely and useful editorial coverage of the developing science of weight loss. Such reporting will assist individuals in making informed and healthy decisions about this important issue. Publishing industry executives also are willing to meet with the Commission informally to discuss the issue of weight loss advertising generally and how they as publishers, and not censors, can voluntarily assist the Commission in educating the public about the topic.

Finally, the publishing industry supports advertiser self-regulation of weight loss advertising so long as it provides credible decisions. In that regard, the MPA and the NAA concur in the Commission's assessment that "The National Advertising Division of the Council of the Better Business Bureaus . . . enhances its credibility and provides valuable information to consumers [and publishers] . . . [because] [o]ne of the hallmarks of the NAD self-regulatory program is that all of its decisions are made public." Transcript at 115. While the Commission is probably correct in observing that every

weight loss product manufacturer will not participate in reputable self-regulatory systems, that does not mean self-regulation will not improve the quality of weight loss advertising generally. After all, most weight loss advertisements are absolutely true according to the Commission's own exacting standards. We expect advertisers that make truthful claims would have a substantial interest in making their competitors do the same.

Respectfully submitted,

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## APPENDIX

The Commission posed slightly different claims to the scientists at the Workshop than the list of prohibited claims it published in the Federal Register. Moreover, neither the claims given to the scientists nor the Commission's proposed list of prohibited claims ever appeared *verbatim* in any of the examples the Commission provided at the Workshop. Thus, the scientists were asked to assume that each advertisement proffered as an example by the Commission in fact contained a disfavored claim.

We question the Commission's tactic of pursuing scientific consensus by requiring scientific assumption of critical facts. Indeed, the Commission's action in this regard fatally compromises the consensus the Commission attempted to build by polling the scientists. From the Transcript, it is impossible to determine what the scientists were polled about: the claims themselves; the advertisements the Commission proffered as examples of the claims; or the claims and advertisements as modified by the facts the Commission asked the scientists to assume. For the purpose of clarity, our comments will address only the scientists' responses to the claims themselves.

### Claim 1

"The advertised product will cause substantial weight loss to all users." The Commission believed that an advertisement which said: "No will power required . . . [w]orks for everyone no matter how many times you've tried and failed before" was a good example of this claim. In the course of their discussion, Drs. Stifler, Bruner and Yanovski all said that the claim could be true and Anthony Almada, Chief Scientific Officer for IMAGINutrition, believed a product that could cause weight loss for all users was scientifically feasible. Transcript at 30-32.

Although some of the doctors stated that the proffered claim would be true only if the advertisement said to use the product in conjunction with a specific dietary regimen, this simply underscores the point that a critical reading of the advertisement, as a whole, is necessary in order to reach a valid conclusion. Taking the time needed to consider claims in context of course contradicts the Commission's statement that "a simple reading" is all that is needed to eliminate questionable claims through screening. Transcript at 234. It also undercuts the Commission's contention that the claims on its list are "almost certainly false" "on their face" and therefore do not require any significant scrutiny. Report at 24; Transcript at 234.

### Claim 2

"The advertised product will cause permanent weight loss." The Commission cited as an example an advertisement that read: "Get it off and keep it off. You won't gain the weight back afterwards because your weight will have reached an equilibrium." Transcript at 36. Dr. Stern commented that long-term trials for the fat blocking drug, Xenical, indicated that users were able to take the drug and keep weight off for years. Transcript at 44. Dr. Greene noted that the questioned claim could be true if the

advertisement indicated that the user would need to "continue to use the product." Transcript at 39-40. Thus, again, there was no scientific problem with the claim itself. According to the experts, a problem might arise only if the claim were coupled with an assertion – not clear from the face of the advertisement itself – that continued use of the product was not needed to maintain weight loss. Transcript at 41.

**Claim 3**

"Consumers who use the advertised product can lose substantial weight while still enjoying unlimited amounts of high calorie foods." In lieu of an actual advertisement that made this claim, the Commission made one up: "Eat as much as you want, the more you eat, the more you'll lose, we'll show you how." Transcript at 45. Mr. Almada observed that the claim did not make it clear whether the consumer could lose weight if he or she maintained or increased their intake of high calorie foods. He postulated that if "unlimited" meant eating to satiety than the claim could be true. Transcript at 49. The remaining panelists used the claim as a platform for extolling the efficacy of low-fat diets. Transcript at 46, 47, 50. They must have been unaware of the article released on the day of the Workshop reporting on the Duke University study that found high-fat diets (like the Atkins Diet) resulted in more significant weight loss than the low-fat diet recommended by the American Heart Association ("AHA"). *See* Haney, Daniel Q. *"High Fat Diet Shows Promise in Study,"* Associated Press, November 19, 2002.

Among other things, the Duke University study found that dieters who were allowed to eat unlimited amounts of high fat foods like eggs and meat lost much more weight than those on the AHA low-fat diet. *See* Westman, Eric, *"Effect of a Low-Carbohydrate, Ketogenic Diet Program on Fasting Serum Lipid Subfractions,"* American Heart Association Scientific Sessions 2002, Poster Section, November 2002, Study funded by Robert C. Atkins Foundation, Inc.; *see also* Liebman, Bonnie, *"The Diet Wars,"* Nutrition Action Health Letter, June 2002, *citing* National Institute of Health funded study finding that participants on Atkins diet lost twice as much weight as low-calorie dieters.

Of course no scientist can be aware of every new study that contradicts long-standing assumptions about weight loss, *e.g.* the only way to lose weight is to reduce caloric intake through a low-fat diet. And therein lies one of the fundamental problems with the Commission's approach. In its haste to implement censorship guidelines, the Commission has forgotten that the state of science is constantly evolving. If anything, the new research regarding Atkins-like diets shows that what the Commission considers "almost certainly false" today can in fact be "quite possibly true" tomorrow.[6]

[6] At the Workshop, the Commission encouraged the scientists to ignore such current developments in weight loss science by limiting their discussion to "OTC drug products, dietary supplements, creams, wraps, devices and patches" and not to "the Atkins Diet." Transcript at 18. In doing so, we assume the Commission was unaware of the fact that the Atkins Center currently offers 66 dietary supplements for sale through its web site. These supplements, 65 of which are in pill form, are premised on the same scientific

**Claim 4**

"Consumers who use the advertised product can lose weight only from those parts of the body where they wish to lose weight." The Commission said the following advertisement contained an example of this claim: "[The product] has taken quite some inches off my butt, 5 inches, and thighs, 4 inches, my hips now measure 35 inches, I still wear the same bra size, though the fat has disappeared from all the right places." Transcript at 51. Mr. Almada said there was clinical evidence to support the claim that users of a certain patented thigh cream, developed by two "scientists of significant distinction," could spot reduce. Transcript at 54. Dr. Stern stated that spot reduction products were scientifically feasible if the delivery mechanism was appropriate. Transcript at 56. Dr. Wadden concurred, stating that the panel needed to know more about fat cell morphology and function to have a conclusive opinion. Transcript at 57. Drs. Blackburn, Bruner, Heymsfield and Yanovski could not state unequivocally whether the claim was true or false. Transcript at 57.

**Claim 5**

"The advertised product will cause substantial weight loss through the blockage or absorption of fat or calories." The Commission said an example of such a claim is an advertisement that said: "Lose up to two pounds daily. The named ingredient can ingest up to 900 times its own weight in fat, that's why it's a fantastic fat blocker." Transcript at 59. In his opening remarks on the mechanics of weight loss, Dr. Heymsfield stated that fat absorption agents, *i.e.* pills, do in fact work. "[I]f we give you an agent that blocks the absorption of fat, that will have the same net effect as reducing your [caloric] intake." Transcript at 24. When the issue was discussed by the entire panel, several specific fat blockers were mentioned, including Xenical and Orlistat. In sum, the panel was unanimous in its agreement that fat absorption pills could effectively reduce weight. The bulk of their discussion centered on how to define the non-scientific term "substantial weight loss." Some believed it should be analyzed as a percentage of body weight while others thought that a straight poundage standard was appropriate.

The panel's discussion in this regard illustrates an important point: namely, that in order to screen advertisements for products that claim to "block or absorb fat calories" appropriately, publishing executives would need to accomplish what the scientists could not – decide upon an appropriate measuring standard to determine reasonably achievable weight loss from the use of such products. Given that at least some of these products are clearly not bogus – as their categorical inclusion in the prohibited claims list implies – it is hard to see how perfectly legitimate fat blocking product advertisements would not be censored because publishing executives could not decide, on deadline, whether to use a poundage or percentage of body weight standard in determining whether the level of weight loss suggested by the ad is reasonable.

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principles as the Atkins Diet. Thus, the science the Commission pushed aside at the Workshop applies directly to the products the Commission seeks to regulate.

**Claim 6**

"Consumers can lose substantial weight through the use of the advertised product that is worn on the body and rubbed into the skin." The Commission pointed to an ad that read: "Lose weight safely with the original herbal patch, now available in the U.S.A." Transcript at 72. Every member of the panel recognized the efficacy of trans-dermal delivery devices for a variety of drugs. Transcript at 73-81. Several members of the panel stated that if either ephedrine or caffeine could be delivered trans-dermally through a patch, it would result in weight loss. Transcript at 77-80. Dr. Yanovski stated that he was not qualified to make a blanket pronouncement about the questioned claim because "[he was] not an expert in pharmacology or drug development." Transcript at 80.

Dr. Yanovski's candor belies another core assumption by the Commission: that ad copy screeners at newspapers and magazines – publishers, salespeople, proof-readers – are qualified to make accurate determinations about weight loss products without professional training. Again, it is hard to see how advertising for potentially efficacious products – like the trans-dermal products Dr. Yanovski admitted were beyond his ken – would not be censored if the Commission persists in its belief that publishing executives can make decisions that doctors admit they are unqualified to make themselves.

**Claim 7**

"Consumers who use the advertised product can lose substantial weight without reducing caloric intake and/or increasing their physical activity." The advertising example: "U.S. patent reveals weight loss of as much as 28 pounds in 4 weeks and 48 pounds in 8 weeks. Eat all your favorite foods and still lose weight. The pill does all the work." Transcript at 82. This is perhaps the most egregious example of the Commission's attempt to suggest that a broad claim categorically applies to a specific ad. Anyone reading the claim and the Commission's example would see that the two are anything but the same. The first makes a broad statement about substantial weight loss without reducing caloric intake or increasing physical activity and the second makes hyper-specific weight loss claims pursuant to a universal timetable. Most of the scientists on the panel ignored the Commission's example and devoted their time to discussing what "substantial weight loss" could mean to various people under various circumstances. Transcript at 86, 91-93. After discussing a variety of weight loss products that did in fact reduce weight without diet or exercise, Transcript at 82-84, Mr. Almada summed up the problem with the Commission's attempt to define "substantial weight loss" scientifically:

> Given my experience directly . . . there are many consumers that seek the scale rather than body composition as their index of performance, and if they see a shift of two or three clicks on a weight scale in two or three weeks, they are enchanted if they have had to do nothing else than

> just take a supplement or rub a cream on, assuming that the cream works.
>
> So, I would argue on behalf of the consumer that "substantial" to them would be a weight loss that would be desirable and that they could measure freely and that would be using a scale or a dress size or pants size in the context of how a consumer would interpret this [claim].
>
> We have a tendency, being scientists, to take a reductionist approach . . . but because we're talking in the context of advertising, the consumer relevance, I think is paramount.

Transcript at 93. Thus, according to at least one expert, there was nothing wrong with the claim.

**Claim 8**

"Consumers who use the advertised product can safely lose more than three pounds per week for a period of four weeks." The Commission did not provide an advertisement that actually contained this claim. Transcript at 98. Not surprisingly, almost all of the medical experts relayed anecdotes of people who were able to lose a lot of weight – much more than twelve pounds – in a month without suffering serious side effects. Dr. Stifler even said "[T]here's not a single study that I know of that indicates that slow weight loss is effective long term, that people even get weight loss. As a matter of fact, two . . . articles [suggest] the more rapidly you lose weight, the more weight you lose and the more weight you keep off." Transcript at 104.