

Dear Friends:

In the last couple of months, the Federal Trade Commission has publicly criticized media for running fraudulent advertising. FTC chairman Timothy Muris is now planning a new assault on deceptive advertising that includes "effective media screening." In this issue's feature article, we talk about the likely short-term implications of the FTC's agenda as well as some of the practical and legal aspects surrounding media's efforts to screen advertising.

Toward the year's end, I sensed that many of our clients were making determined efforts to "clean house"—turning over aged receivables for third-party collection well before they became virtually "uncollectable." Receivables are extremely volatile right now, so we urge all our clients not to wait too long to "clean out" troublesome accounts. In the meantime, we all look forward to an upswing in 2003!

Best wishes for a wonderful and prosperous New Year,



Pete Szabo, President
Szabo Associates, Inc.

FTC Challenges Media to Curb False Advertising

Federal Trade Commission chairman Timothy Muris wants media to take more responsibility for false diet and health related advertising claims. In a November 14th appearance on CNBC's Capitol Report, Muris told interviewer Tyler Mathisen, "reputable publications are running obviously fraudulent advertising, and they should be doing a better job screening them. I'm willing to make this a big deal."

Five days after Chairman Muris appeared on CNBC, the FTC hosted a workshop on "Deception in Weight Loss Advertising." Participants included scientists, academics, advertisers, industry representatives, and media representatives. The purpose of the workshop was to help the FTC develop new approaches to combat fraudulent weight loss advertising. In his opening remarks, Muris stated his intention to fight fraud on four fronts—law enforcement, consumer education, industry self-regulation, and effective media screening.

What do these statements by the FTC chairman portend for media? How will the FTC expect media to "screen" this advertising? Does the FTC's targeting of weight-loss advertising foreshadow governmental scrutiny of other types of advertising and therefore broader implications for media?

According to Mary Engle,

Associate Director for Advertising Practices of the FTC's Bureau of Consumer Protection, the FTC chose to target weight-loss advertising specifically as a result of the FTC's recent analysis of current trends in weight-loss advertising and its conclusion that this advertising poses a potential danger for the public. Its findings were published in a September 2002 report. According to the report, the number of fraudulent claims in weight-loss advertising has continued to rise significantly over the past decade despite unprecedented levels of FTC enforcement and broad consumer education programs. The report concludes that consumers taken in by fraudulent claims lose both economically by wasting resources on products that do not work as advertised, and medically by foregoing or postponing other weight-loss methods and lifestyle changes that have demonstrated benefits. "Fifty percent of American adults are overweight," said Ms. Engle, "and the FTC recognizes the serious health implications of obesity."

In its September report, the FTC cast a wide net of criticism on media not only for failing to curb the proliferation of false weight-loss advertising but also for possibly exacerbating the

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problem by lending credibility to the advertising. While citing the major television broadcast networks, ABC, CBS, and NBC, as well as Good Housekeeping magazine as exceptions, the report stated, “It is apparent that most media make little or no attempt to screen questionable ads for weight-loss products.” The Commission also reported that “recent efforts to heighten media awareness have been largely unsuccessful.”

The FTC also acknowledged, on the other hand, that many media companies cannot support the detailed screening of advertising that major television networks can employ. “Our goal is much more modest,” stated Muris in his opening remarks at the Weight Loss Workshop. “We are talking about screening out the most egregious examples.”

Both Chairman Muris, in his CNBC interview, and Ms. Engle characterized the FTC’s relationship with media in these efforts as one of cooperation and helpfulness. “We will work with media—the newspaper association, the cable association, the radio association, the magazine association—to improve self-screening,” said Muris. “We are trying to get [media] fired up and giving them what they need, which is a short list of claims that are clearly fraudulent.”

“The FTC’s emphasis regarding media responsibility is on self-regulation,” said Ms. Engle. We want to encourage media to help us, so we will issue a guide that will be helpful to media.” She restated the chairman’s intention to publish a “short list” of clearly false claims, which media should consult prior to allowing an ad to run. “We want the

list to be short, punchy, easy-to-identify claims,” she said. The FTC hopes to have the guide available in spring 2003.

Because the FTC’s mandate is to work for consumers to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them, advertising for any type of product or service is subject to FTC scrutiny. It is not unreasonable, therefore, for media to question whether other types of advertising that fall within the Commission’s purview will undergo a similar level of scrutiny with corresponding implications for media.

Ms. Engle implied that because the FTC was involving media in the screening process for reasons peculiar to weight-loss advertising—the rampant and growing use of fraudulent claims and the serious health problems associated with excess weight—media need not be concerned that they would become responsible for screening every type of advertising.

Nevertheless, the FTC’s efforts have compelled media groups and industry associations to voice opinions not only about the FTC’s current agenda and the practicality of screening advertisements, but also about broader implications, such as who is ultimately responsible for advertising content and possible legal issues surrounding media involvement in the screening process.

In its comments presented before the FTC in October, the Newspaper Association of America addressed practical and legal constraints that limit a newspaper’s ability to pre-screen advertisements, noting the volume of ads published on any given day, the short time frame available to receive, lay out, and print ads, the resources

that it would take to thoroughly screen advertisements, and potential legal liability newspapers could face if they take it upon themselves to confirm third-party advertising claims. The NAA also stated, “While the newspaper industry commits itself to working with the FTC on this important issue, NAA believes that advertisers are ultimately responsible for the content of their advertising, and further, that the FTC and other government authorities are responsible for enforcing advertising laws.”

The National Cable & Telecommunications Association and the Cabletelevision Advertising Bureau, in their comments to the Commission, also addressed the practical challenge of screening advertisements, comparing the number of commercial units of advertising sold by cable systems and cable program networks to the number of units sold by broadcast networks, as well as the average cost difference per unit between cable networks and broadcast networks. They argued that these realities make it unreasonable to expect cable networks to devote the same resources as broadcast networks to reviewing and substantiating advertising claims. At the same time, they acknowledged that if there are ways to help systems and networks identify and prevent distribution of clearly false and misleading advertising, the cable industry and their customers will be the beneficiaries. Additionally, they pointed out possible First Amendment implications of applying an overbroad screening approach that “precludes the truthful advertising of a lawful product,” and thus “keeps consumers from receiving

information that may be useful to them.”

At the FTC’s November workshop, a media panel discussion was the format for lively debate about the media’s role in screening advertising.

Panelists discussed the pros and cons of the FTC’s supplying media with a list of scientifically infeasible claims. One challenge mentioned was that the list would constantly change, which could encourage categorical rejection of ads; however, there was general consensus that a list of “buzzwords,” a “too-good-to-be-true” list, could be helpful in making decisions.

Another concern mentioned was that in today’s litigious climate, where McDonald’s is sued for making people fat, media charged with screening ads could be sued for running a false ad. This concern begged the question, “Does this open the door for having to screen all advertising?”

A First Amendment professor addressed these concerns,

stating that they underscored the importance of specificity in any short list of fraudulent claims. A formal, specific notification system might provide safe harbor for media in private lawsuits if the offending material were not included in the notification.

He also pointed out that prior to 1976, commercial advertising was not covered by the First Amendment. When that changed, the Supreme Court supplied three caveats regarding the protection of commerce speech. First, the First Amendment does not protect the advertising of an illegal product. Second, the First Amendment does not protect false and misleading advertising. And third, commercial advertising of a legal product that is neither false nor misleading is substantially protected, but not as fully protected as news, opinion, art, and other categories that get as much protection as the First Amendment has to give.

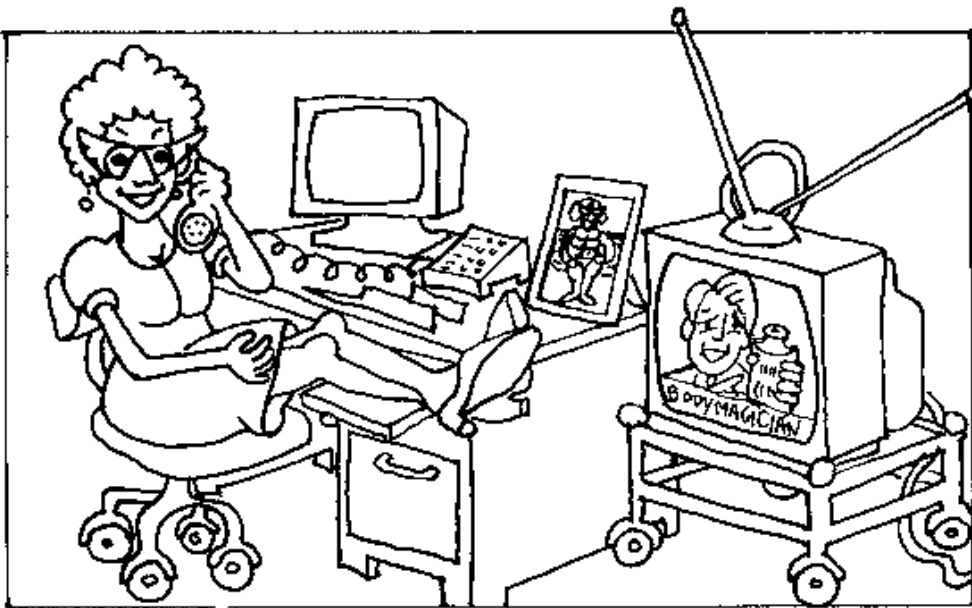
Additionally, he said that there are circumstances in which there could be media lia-

bility for running fraudulent advertising, but it would be necessary to show that they had moderately specific knowledge about how the ad was false or misleading. Additionally, under lower court case law, a “should-have-known negligence” standard could apply. The professor also stated that if media were given notification about misleading ads, the notification should be specific and identifiable. He added that the more that is done to reduce the degree of uncertainty, the less likely media would be deterred from taking legitimate ads.

Clearly, the issue of media responsibility in screening advertising is a complex one. Opinions regarding the practical and legal aspects of the issue will continue to circulate among media properties and their counsel.

At our press time, Ms. Engle stated that the FTC would issue a federally registered notice holding open the comment period following its recent weight-loss advertising workshop “probably until January 31st.” She was hopeful that the FTC’s “short list” of fraudulent weight-loss claims designed to assist media in screening out unacceptable weight-loss advertising would be published sometime in the spring.

We shall see if the media industry’s efforts toward self-regulation in screening this type of advertising produces the results that the FTC wants. “The FTC acts as a referee [in the marketplace],” said FTC Chairman Muris in his final comments on CNBC’s Capitol Report. “We set the rules of the game, and that’s different than heavy-handed regulation, which we’re opposed to.” ♦



“LORETTA, YOU KNOW THAT STUFF ON TV THAT’S SUPPOSED TO GIVE YOU CURVES WHERE YOU DON’T HAVE ANY AND WANT THEM AND GET RID OF THE ONES YOU HAVE AND DON’T WANT? SO HOW DOES IT KNOW WHICH IS WHICH?”

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