

WHITE PAPER

GUIDANCE FOR FOOD ADVERTISING SELF-REGULATION

- An historical overview of the investigations of food, nutrition and weight loss advertising of the Children's Advertising Review Unit (CARU) and the National Advertising Division (NAD)
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I. EXECUTIVE SUMMARY

The White Paper

In fulfillment of its mission to provide leadership in advertising self-regulation and to increase the understanding of the role of self-regulation of food advertising to children and adults, the NARC Board of Directors has published this White Paper. NARC undertook this White Paper because of a concern that there could be widespread lack of awareness of the self-regulatory system's work with food advertising. A better understanding of advertising self-regulation, public awareness of the role of self-regulation, and the important examples of food advertisers' voluntary compliance with CARU and NAD decisions and recommendations can increase public confidence that advertising meets the highest standards of truth and accuracy.

C. Manly Molpus, President and CEO of the Grocery Manufacturers of America (GMA, a trade association representing major food industry manufacturers), also suggested that many consumers, companies and policy makers would benefit from a greater understanding of all that self-regulation has accomplished in the United States and thus better appreciate its full potential to be a significant force in the future.

This White Paper documents ongoing self-regulatory efforts, publicizes the existing decisions that have been made in the category of food advertising and provides an historical overview with representative examples from over 900 cases and inquiries on food and nutrition advertising by CARU and NAD. It also includes a section on current developments that synthesizes CARU's principles, guidelines and decisions related to food advertising to children.

Current Developments

Health and Human Services Secretary, Tommy Thompson, has stated that "obesity has become a crucial health problem for our nation" and Dr. Julie Gerberding, Director of the Centers for Disease Control and Prevention, refers to "the epidemic of overweight among today's youth."

The significance of the problem for children is highlighted in a report from the American Obesity Association (AOA), which estimated that 15.5 percent of adolescents (ages 12 to 19) and 15.3 percent of children (ages 5 to 11) are obese. Those figures have more than doubled for children over the last two decades and tripled for adolescents in the same time period.

Clearly, there is no single cause for the rising incidence of childhood obesity and no simple solution. Many factors are involved including, but not limited to, the severe reduction in physical education programs in schools, the replacement of outdoor activities with sedentary activities and the over-consumption of food.

Marketers of food products are currently responding to this very serious public health concern. The food industry has responded with numerous product innovations and education programs. Positive steps include the addition of nutritional information on menus to indicate fat, calories and fiber, the removal of trans fat from marketed snacks, new lines of products without fatty acids and lines of nutritionally enhanced products.

Yet, if a lack of confidence in advertising provokes unnecessary restrictions on information available to consumers, then both producers and consumers will lose. Confidence can be increased by a better understanding of advertising self-regulation.

The Advertising Self-Regulatory Process

The Federal Trade Commission (“FTC”) and the Food and Drug Administration (“FDA”) are the principal federal regulators of advertising and labeling claims for foods. The next level of protection, and probably second only to the advertisers themselves in terms of the volume of advertising reviewed, is the advertising industry’s system of self-regulation created by advertisers, their agencies, and the media.

NARC

In 1971, the Association of National Advertisers (ANA), the American Association of Advertising Agencies (AAAA), and the American Advertising Federation (AAF) allied themselves with the Council of Better Business Bureaus (CBBB) to create an independent self-regulatory body -- the National Advertising Review Council (NARC). The goal of NARC is to sustain the highest standards of truth and accuracy in advertising through self-regulation and, in turn, provide guidance and set standards of truth and accuracy for national advertisers. The self-regulatory system developed by NARC encourages advertisers’ cooperation and compliance by focusing on three goals:

- increase public trust in advertising
- maintain a level playing field for settling disputes among competing advertisers
- minimize the need for government involvement in the advertising business.

CARU

The Children’s Advertising Review Unit (CARU) is the self-regulatory body for children’s advertising and plays a major role by insuring truthful, non-deceptive advertising to children under the age of 12.

CARU was founded in 1974 to promote responsible children’s advertising under NARC policy direction.¹ CARU’s mission is not only to ensure the truth and accuracy of child-directed advertising, but, because of the inherent susceptibilities of young children, to ensure that advertising to children meets a host of principles and guidelines created to protect children. These precepts are embodied in the *Self-Regulatory Guidelines for Children’s Advertising* (the Guidelines). CARU’s *Self-Regulatory Guidelines* are deliberately subjective, going beyond the issues of truthfulness and accuracy to take into account the uniquely impressionable and vulnerable child audience. Pursuant to its charter, CARU handles competitive challenges and consumer complaints, but over 95% of its inquiries arise from its own monitoring of television, print, radio and Website advertising.

CARU’s basic activities are the review and evaluation of child-directed advertising in all media, and online privacy practices as they affect children. When these are found to be misleading, inaccurate, or inconsistent with CARU’s *Self-Regulatory Guidelines for*

¹ See NAD/CARU/NARB Procedures, at Appendix I.

Children's Advertising or relevant laws, CARU seeks change through the voluntary cooperation of advertisers.

From its inception, CARU has reviewed and reported on over 1,100 child-directed advertisements. Initially, most were for toys and cereals, the products most frequently advertised to children, but over the years the universe of child-directed advertising has expanded to include a wide range of products. Over 150 cases and inquiries have involved food advertising to date.

The issues addressed in CARU cases and inquiries have been remarkably consistent over the past three decades, and CARU's Guidelines have consistently addressed them. Whether the issue was encouragement of excessive consumption of snack foods, denigration of meals in favor of snack foods, misleading comparisons of nutrient content, exaggeration of the benefits of the product, CARU's case histories demonstrate that its monitoring efforts have been effective in identifying food advertising that violated its Guidelines, and in encouraging advertisers to voluntarily modify those ads.

As CARU's record has grown, its caseload has increasingly included a variety of cases that involve the advertising of food to children. CARU's Guidelines contain several principles and guidelines that either specifically address, or are applicable to, advertising of food to children.² The relevant sections of the *Self-Regulatory Guidelines for Children's Advertising* are as follows:

Principles

1. Advertisers should always take into account the level of knowledge, sophistication and maturity of the audience to which their message is primarily directed. Younger children have a limited capacity for evaluating the credibility of information they receive....Advertisers, therefore, have a special responsibility to protect children from their own susceptibilities.

4. Recognizing that advertising may play an important part in educating the child, advertisers should communicate information in a truthful and accurate manner...with full recognition that the child may learn practices from advertising which can affect his or her health and well-being.

7. Although many influences affect a child's personal and social development, it remains the prime responsibility of the parents to provide guidance for children. Advertisers should contribute to this parent-child relationship in a constructive manner.

Product Presentations and Claims

"...[A]dvertisers need to examine the total advertising message to be certain that the net communication will not mislead or misinform children."

² See CARU's Self-Regulatory Guidelines on Children's Advertising, at Appendix II.

1. *Copy, sound and visual presentations should not mislead children about product or performance characteristics. Such characteristics may include...nutritional benefits.*
2. *The advertising presentation should not mislead children about benefits from use of the product. Such benefits may include, but are not limited to, the acquisition of strength, status, popularity, growth, proficiency and intelligence.*
7. *The amount of product featured should be within reasonable levels for the situation depicted.*
8. *Representation of food products should be made so as to encourage sound use of the product with a view toward healthy development of the child and development of good nutritional practices.*
9. *Advertisements representing mealtime should clearly and adequately depict the role of the product within the framework of a balanced diet.*
10. *Snack foods should clearly be depicted as such, and not as substitutes for meals.*
11. *If objective claims are made in an advertisement directed to children, the advertiser should be able to supply substantiation.*

Sales Pressure

Children are not as prepared as adults to make judicious, independent purchase decisions. Therefore, advertisers should avoid using extreme sales pressure in advertising presentations to children.

1. *Advertisements should not suggest that a parent or adult who purchases a product or service for a child is better, more intelligent or more generous than one who does not. Advertising directed toward children should not create a sense of urgency or exclusivity, for example, by using words like “now” and “only.”*
2. *Benefits attributed to the product or service should be inherent in its use... Advertisements should not imply that purchase and use of a product would confer upon the user the prestige, skills or other special qualities of characters appearing in advertising.*

Disclosures and Disclaimers

1. *All disclosures and disclaimers that are material to a child should be in language understandable by the child audience, legible and prominent. When technology permits, both audio and video disclosures are encouraged, as is the use of demonstrative disclosures.*

Comparative Claims

Advertising which compares the advertised product to another product may be difficult for young children to understand and evaluate. Comparative claims should be based on real product advantages that are understandable to the child audience.

- 1. Comparative advertising should provide factual information. Comparisons should not falsely represent other products or previous versions of the same product.*
- 2. Comparative claims should be presented in ways that children understand clearly.*
- 3. Comparative claims should be supported by appropriate and adequate substantiation.*

Endorsement and Promotion by Program or Editorial Characters

Studies have shown that the mere appearance of a character with a product can significantly alter a child's perception of the product. Advertising presentations by program/editorial characters may hamper a young child's ability to distinguish between program/editorial content and advertising.

- 3. Program personalities, live or animated, should not be used to sell products, premiums or services in or adjacent to programs primarily directed to children in which the same personality or characters appear.*
- 4. Products derived from or associated with program content primarily directed to children should not be advertised during or adjacent to that program.*

Other sections of the Guidelines, such as Kids' Clubs and Premiums, Promotions and Sweepstakes also apply to food advertising.

All of these sections of the Guidelines are an overlay on CARU's responsibility, i.e., to ensure that advertising to children is truthful, accurate, not misleading, and does not omit material facts. A cardinal rule of advertising law is that although a claim may be literally true, the context in which it is presented may still cause it to be misleading to consumers. Advertisers must be especially sensitive to this rule when advertising to children.

CARU believes that its current Guidelines, as illustrated by the cases cited in this White Paper, adequately address the advertising of food to children.

NAD

The National Advertising Division (NAD) of the Council of Better Business Bureaus is the investigative arm charged with monitoring and evaluating truth and accuracy in national advertising directed towards consumers age 12 and over. The majority of NAD cases today come from competitive challenges, but advertising review proceedings can also be commenced based on complaints from local Better Business Bureaus, individual

consumers or consumer groups. Cases also arise from NAD's routine monitoring of advertising and promotion in all media.

NAD's mission is to ensure the integrity of advertising by monitoring and reviewing national advertising for truthfulness and accuracy. Over the past 32 years NAD has handled over 750 advertising review proceedings involving food, health, nutrition and weight loss claims. NAD's decisions in these cases have provided consistent and timely guidance to the food industry as the regulatory and legal landscape has changed over the years.

The 1970's:

- Consumer advocates test the legitimacy of the self-regulatory forum by bringing numerous cases challenging a wide variety of advertising claims including health claims for vitamins, nutrition claims for sugar, calcium claims for low fat milk and weight loss claims for slimming gloves.
- The balance of NAD's caseload in the 1970's is composed of cases brought through NAD's own monitoring efforts, including the review of advertisements for foods such as peanut butter, raisins and wheat germ promising health benefits, and other products and services making weight loss, "low cholesterol" and "low fat" claims.
- NAD's early decisions establish that NAD will apply traditional advertising law standards when reviewing advertisements and require that advertisers adequately disclose material information and not overstate nutritional and health benefits or make unsubstantiated "weight loss" promises.
- In 1979 the FTC issues a policy statement embracing comparative advertising as pro-competitive and pro-consumer. With its issuance, "Brand X" advertising takes its place in the annals of advertising history and a new chapter opens for the advertising industry and its self-regulatory forum.

The 1980s:

- Comparative advertising comes into vogue and although consumer activists continue to file challenges and NAD continues its monitoring efforts, a growing number of the food and nutrition cases brought before NAD are commenced by competitors.
- Competitors challenge advertisements comparing the nutritional content of competing food products including fish sticks (calorie and protein content), jelly (sugar content) and baby food (chemically modified versus "natural" starch).
- Pursuant to its monitoring efforts, NAD reviews nutrition claims for foods including bread, avocados and frozen dinners, as well as foods promising specific health benefits such as "helps control blood pressure" and "better for people with high blood pressure or heart disease..."

The 1990s:

- Congress passes the Nutrition Labeling and Education Act (NLEA), which changes the existing rules for food packaging and labeling to provide consumers with new and consistent information about the nutrition and health benefits of the foods they eat. NAD in reviewing NLEA regulated claims for food products such as “fresh” and “cholesterol free” seeks to harmonize its efforts with the framework developed by Congress, the FDA and the FTC.
- NAD carves out safe harbors for a new and growing food category through its review of numerous direct-to-consumer advertisements for infant formula products that compare the nutritional benefits of infant formulas to competing products and to breast milk.
- Acknowledging the growing consumer interest in diet and health, industry responds by increasing nutritional information in food advertising. This serves as a catalyst for an NAD conference on health claims where experts discuss the underlying science, the new regulations and responsible marketing practices.
- Competitors challenge comparative nutrition claims for cereal products, cooking oil, fruit sweetened jams and meal replacement bars. NAD focuses its monitoring efforts on health claims, reviewing an increasing number of advertisements for weight loss products including shoe inserts, appetite suppressants and dietary supplements.

The 21st Century:

- NAD hosts a two-day conference in March 2002 entitled “Health Claims in Advertising: From Foods to Pharmaceuticals” encouraging additional dialogue between industry, regulators and consumers to explore the legal challenges posed by the rapidly expanding arena of health claims in advertising.
- NAD’s jurisdiction to review direct-to-consumer prescription drug advertisements is affirmed by the NARB. In addition, NAD reviews a growing number of problematic claims for dietary supplements and herbal products which, despite the passage of the Dietary Supplement Health and Education Act of 1994 (DSHEA), have begun to make extraordinary efficacy claims with little or no scientific evidence as support.
- NAD currently focuses most of its monitoring efforts on weight loss claims for foods, dietary supplements, meal replacements and weight loss programs to ensure that the playing field remains level and that consumers receive truthful and accurate information regarding the health benefits and weight loss capabilities of the products on the market.

Since the 1970’s NAD’s historic record demonstrates that it has consistently met issues, including those relating to food advertising. Each decade, it has encountered a significant public policy issue that is reflective in advertising. Each raised new concerns and each was met successfully.

PREFACE

A. Purpose

The purpose of this document is to provide a White Paper on food advertising at a time when the rising incidence of obesity in adults and children has become a major public health concern. For over three decades, the policies and procedures for the advertising industry's self-regulatory system have been set by the National Advertising Review Council (NARC). The application of these policies and procedures has continued to evolve to meet the issues that have confronted advertising in a changing marketplace since 1971 for the National Advertising Division (NAD) of the Council of Better Business Bureaus, and since 1974 for the Children's Advertising Review Unit (CARU). The history of cases and investigations by CARU and NAD is proof that the self-regulatory process has had considerable influence in ensuring truthful and accurate food and beverage advertising. And, CARU investigations reflect the fact that particular attention has been paid to children's advertising, where the messages need to be more than truthful and accurate--appropriately tailored to the cognitive abilities of vulnerable children.

In fulfillment of its mission to provide leadership in self-regulation of advertising and to increase the understanding of the role of self-regulation as it relates to the advertising of food to children and adults, the NARC Board of Directors has published this White Paper. It provides an historical overview with representative examples from over 900 cases and inquiries on food and nutrition published by CARU and NAD.³ It also includes a section on childhood obesity that synthesizes CARU's principles, guidelines and decisions related to food advertising to children. NARC believes this will offer direction from existing decisions. More importantly, this guidance will provide the advertising community and the general public with a more detailed picture of the contribution that self-regulation has made and can make to ensure the truth and accuracy and, in the case of children, the appropriateness of child-directed food advertising in the United States. As for the future of self-regulation, NARC commits to advertisers, consumers and policy makers that its processes will remain transparent, objective and informed by advertising law experts whose foremost interest will be to maintain the

³ See NAD/CARU/NARB Procedures, at Appendix I

integrity of advertising. NARC strives to remain true to the description by the current Chairman of the Federal Trade Commission (“FTC”), Timothy J. Muris, “When faced with an increasingly active FTC and a concerned public, the advertising industry responded...today it remains a model of self-regulation.”⁴ NARC also acknowledges the support the food industry, their advertising agencies and the media bring to the self-regulatory process. Industry’s participation in self-regulation as demonstrated by the voluntary advertising review conducted by many media outlets (such as the major TV networks) and by asking the self-regulatory arm of the media to scrutinize advertising claims is vital in providing CARU and NAD more eyes and ears on the issue. Further, companies who review their own advertisements to ensure they comply with truth and accuracy standards, participants in the self-regulatory process who voluntarily modify their advertisements to comply with the CARU and NAD decisions also confirm the industry’s commitment to self-regulation.

B. The Voluntary Self-Regulatory System: The Roles of NARC, CARU, NAD and NARB

1. *NARC*

In 1971, the Association of National Advertisers (ANA), the American Association of Advertising Agencies (AAAA), and the American Advertising Federation (AAF) allied themselves with the Council of Better Business Bureaus (CBBB) to create an independent self-regulatory body -- the National Advertising Review Council (NARC). The goal of NARC is to sustain the highest standards of truth and accuracy in advertising through self-regulation and, in turn, provide guidance and set standards of truth and accuracy for national advertisers. The self-regulatory system developed by NARC encourages advertisers’ cooperation and compliance by focusing on three goals:

- increase public trust in advertising
- maintain a level playing field for settling disputes among competing advertisers
- minimize the need for government involvement in the advertising business.

⁴ Remarks by Timothy J. Muris, Chairman, Federal Trade Commission, delivered at the Second Annual Conference, American Antitrust Institute, June 12, 2001, Washington, D.C.

2. CARU

CARU is the investigative arm charged with the promotion of responsible advertising to children under the age of 12. Like NAD, CARU reviews and evaluates advertising claims for truth and accuracy, but acknowledging children's developing cognitive abilities, CARU deals with issues that the law does not address, helping to ensure that commercials or advertisements directed to children do not contain inappropriate messages. CARU systematically monitors advertisements from broadcast and cable TV, radio, children's magazines, the Internet and online services. CARU works hard to develop and maintain standards for advertisers that take into consideration children's developing cognitive abilities, the evolving media landscape and new technologies. As part of its expanding and evolving mission, CARU not only monitors advertising to children in all media, it also monitors websites for compliance with the "Interactive Electronic Media" Guidelines, added to the Guidelines in 1996, which helped establish standards for protecting children's privacy on the Internet and ultimately was helpful in developing the basis for the federal Children's Online Privacy Protection Act of 1998 ("COPPA"). When CARU finds advertisements directed to children to be misleading, inaccurate or inconsistent with the Guidelines, or finds that a website operator does not comply with COPPA or CARU's Guidelines relating to children's privacy and safety on the Internet, it recommends that the advertiser (or website operator) modify or discontinue the advertising or website practices. CARU seeks changes through the voluntary cooperation of advertisers and website operators.⁵

Although the majority of CARU advertising reviews come from its monitoring, like NAD, it also initiates reviews based on complaints from local Better Business Bureaus, consumers, and competitors. Both CARU and NAD have handled cases involving food advertisers since their inception and continue to handle such cases regularly. The guidance that has been established for food advertisers through over three decades of industry self-regulatory decisions is discussed in the CARU and NAD Historical Overview sections that follow.

⁵ See, *infra*, CARU Advertising Review Process.

3. *NAD*

NAD is the investigative arm charged with the responsibility of monitoring and evaluating truth and accuracy in national advertising directed towards consumers ages 12 and over. The majority of NAD cases today come from competitive challenges, but advertising review proceedings can also be commenced based on complaints from local Better Business Bureaus, individual consumers or consumer groups. Cases also arise from NAD's routine monitoring of advertising and promotion in all media.

4. *National Advertising Review Board*

The National Advertising Review Board (NARB) is a peer review group comprised of 70 advertising professionals from among the advertiser, agency and public sectors. In the event that a CARU or NAD decision is appealed, NARB is responsible for forming a panel of five members to consider the appeal.

C. The White Paper Development Process

NARC monitors the overall performance of the voluntary self-regulatory process and addresses issues and concerns confronted by the advertising industry. As a result, NARC may promulgate, adopt, amend and publish advertising standards to aid in its evaluation of the truth and accuracy of national advertising. The NARC Board asked both CARU and NAD to provide a report on the state of self-regulation through an historical overview of their respective roles in maintaining the accuracy, credibility and integrity of food and beverage advertising during their 30 years of existence. This overview synthesizes the relevant decisions of each to further inform the public of the operation, strength, and the value of the self-regulatory system. The NARC Board asked Howard Bell, Chairman of NARB and a highly respected founder of the self-regulatory system, to chair and appoint an ad hoc panel of experienced professionals for their review and comment. This panel's mandate was to advise the NARC Board of Directors on the final draft of the White Paper to be published by NARC.

D. Situation Analysis

1. *Obesity—A Major Public Issue*

The rising incidence of obesity has become a major public issue. Health and Human Services Secretary, Tommy Thompson, has stated that “obesity has become a crucial health problem for our nation” and Dr. Julie Gerberding, Director of the Center for Disease Control, refers to “the epidemic of overweight among today’s youth.”

The food industry has responded with product innovation and education programs. Informing consumers about products and services available to them is essential if they are to enjoy the benefits of the options that food companies provide. Educating consumers, especially parents and their children, how to meet their individual needs, tastes and preferences through the proper balance of activity and nutrition helps empower them to maintain a healthy weight. Advertising is an important means of communicating that information and is a critical element of the competition that drives innovation. If a lack of confidence in advertising provokes unnecessary restrictions on information available to consumers, then both producers and consumers will lose. Confidence can be increased by a better understanding of advertising self-regulation, which is illustrated by CARU and NAD cases which are presented in the Historical Overview section of this document.

The disagreement between those who offer advertising as one of the solutions and those who blame it for contributing to the problem of obesity is at its core a disagreement over the confidence the country has in the credibility of advertising and the systems designed to ensure the credibility of advertising. Implicit (and sometimes explicit) in most criticism of advertising is the assertion that it is misleading or that it takes unfair advantage of consumers. For advertising’s benefits to be realized, it must be truthful; it cannot be deceptive or misleading and it cannot take advantage of vulnerable audiences. Advertisers and consumers both have much at stake in this debate.

The federal agency responsible for regulating advertising notes that advertising can be an important component in consumers' education about obesity. In a comment to the Food and Drug Administration ("FDA"), the FTC staff recently noted:

Truthful, non-misleading health information about foods can benefit consumers and competition. Such information empowers consumers to make better informed choices about the health consequences of the foods they include in their diets. As health consequences become a more important consideration for consumers, food marketers have a powerful economic incentive to develop and market foods based on their nutritional attributes. These efforts, in turn, can provide consumers with even healthier products and more information about the health consequences of the foods they eat.⁶

The government clearly hopes advertising can be part of the solution. William R. Steiger, Special Assistant to the Secretary for International Affairs at the Department of Health and Human Services, recently wrote to the New York Times that "food companies need to provide and promote healthier choices for customers and include better information about their products."⁷

2. *Advertising Review In The United States*

The FTC and FDA are the principal federal regulators of advertising and labeling claims for foods. While the Department of Agriculture, state officials and the courts all play roles in regulating commercial communications, law enforcement is the last line of defense against deceptive advertising. It is first and foremost the responsibility of food manufacturers and their advertising agencies to make sure that the messages they disseminate in advertising comply with applicable standards. The next level of protection, and probably second only to the advertisers themselves in terms of the volume of advertising reviewed, is the system of self-regulation. At the national level in the

⁶ Comments of the Staff of the Bureau of Consumer Protection the Bureau of Economics and the Office of Policy Planning of the Federal Trade Commission before the Department Of Health And Human Services, Food and Drug Administration, *In the Matter of Obesity Working Group Public Workshop: Exploring the Link Between Weight Management and Food Labels and Packaging*, Docket No. 2003N-0338 (Dec. 2003). See also P. Ippolito & A. Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, FTC Bureau of Economics Staff Report (1989) (noting that cereal advertisements educated consumers regarding the benefits of high fiber cereal and increased both the introduction of higher fiber cereals and their consumption).

⁷ William R. Steiger, *An Epidemic of Obesity*, N.Y.T., February 9, 2004.

United States, after the voluntary Network clearance process for broadcast advertising on the major broadcast networks⁸, NARC is the most visible and effective component of the self-regulatory system. Voluntary compliance with the standards established by CARU and NAD require that advertising meet the standards of truth and accuracy. Moreover, compliance with CARU's Self-Regulatory Guidelines for Children's Advertising requires that advertising meet standards especially designed to protect children from unfair and misleading promotions.⁹

NARC has prepared this White Paper to explain and clarify the roles CARU and NAD have played and continue to play in overseeing food and nutrition advertising. This Paper is also intended to illustrate the impact of self-regulation in the marketplace and to summarize the guidance provided to the advertising industry by the self-regulatory system regarding this important issue. This White Paper has also been undertaken with the support of the members of the Grocery Manufacturers of America (GMA), who have encouraged NARC to enlist widespread support among food companies for self-regulation and to focus NAD's and CARU's monitoring and educational efforts on addressing this issue. In an October 23, 2003 letter to the President and CEO of the National Advertising Review Council (NARC) and the Director of the Children's Advertising Review Unit (CARU), the President and CEO of the Grocery Manufacturers of America (GMA)¹⁰ noted that self-regulation of food advertising has evolved into a sophisticated and respected body of standards. He suggested that many consumers, companies and policy makers would benefit from a greater understanding of all that self-regulation has accomplished in the United States and thus better appreciate its full potential to be a significant force in the future. In recognition of the fact that the self-regulatory process has had considerable influence in ensuring truthful and accurate food and beverage advertising for over thirty years, he encouraged NARC to raise public awareness of the role of self-regulation and the important examples of food advertisers'

⁸ Television networks and other major media outlets monitor advertising and request support for a claim before they allow it to run. Local Better Business Bureaus around the country assess the advertising of businesses in their communities.

⁹ See CARU's Self-Regulatory Guidelines for Children's Advertising, at Appendix II.

¹⁰ C. Manly Molpus is the President and CEO of the GMA, the world's largest association of food, beverage and consumer products companies. With U.S. sales of more than \$460 billion, GMA members employ more than 2.5 million workers in all 50 states. Led by a board of 42 Chief Executive Officers,

voluntary compliance with CARU and NAD decisions and recommendations that have helped assure that advertising meets the highest standards of truth and accuracy. With particular attention to the issue of advertising to children, he urged the self-regulatory arm to issue this White Paper on advertising related to diet, nutrition and health and to publicize its policy so it is better understood and accepted.

III. HISTORICAL OVERVIEW OF CARU DETERMINATIONS ON ADVERTISING FOOD TO CHILDREN

A. Background

In the early 1970's, a backlash against child-directed advertising, led by such consumer groups as Action for Children's Television, raised the possibility of government restriction or prohibition of such advertising.¹¹ In August of 1973, FTC Chairman Lewis Engman, who favored self-regulation, spotlighted children's advertising as an area of special importance. By the spring of 1974, he warned that the FTC would act absent an immediate meaningful response from the trade.¹² In response, three years after NARC created the advertising self-regulatory system comprising of NAD and NARB, NARC established CARU as a part of NAD. Its goal was to promote responsible children's advertising through self-regulation.¹³ The dedicated children's unit sharply increased the focus of self-regulation on children's advertising. From 1971 through 1973, NAD investigated eight children's advertisements; in its first four years, CARU handled an average of 22 such investigations per year. By September of 1974 CARU was fully staffed with a Director, an administrative assistant and an advertising review specialist. It has since been expanded to include a Director, two attorneys and two advertising review specialists.

CARU is recognized as a highly successful self-regulatory body with a success rate of over 95% in resolving issues regarding advertising to children.¹⁴ In fact, CARU has

¹¹ In 1974, the Federal Communications Commission ("FCC") took several steps to restrict television advertising to children. The FCC placed limits on the amount of advertising that could be aired during children's programming and restricted certain practices, such as program-length commercials and host-selling, i.e., use of a character in a program to sell the advertised product. Further, in the late 1970's, the FTC attempted to either ban advertisements for sugar-coated foods to children under eleven years of age or ban all television advertising to children under eight years of age. Congress called hearings, refused to accept these recommendations and threatened to shut down the FTC.

¹² The National Advertising Review Board: Precedents, Premises and Performance, Zanot, Dissertation, University of Illinois at Urbana-Champaign (1977), at 145.

¹³ The NARC Board sets policy for CARU's self-regulatory program, which is administered by the CBBB and is funded directly by members of the children's advertising industry.

¹⁴ CARU not only monitors advertising to children in all media, including television, radio, print and on websites, it also monitors websites for compliance with "Interactive Electronic Media" which helped

received high praise from the Federal Trade Commission, whose Deputy Director for the Bureau of Consumer Protection, C. Lee Peeler, has stated:

“As an advertising law enforcement official, I have always found it remarkable that, in the name of self-regulation, major national advertisers would voluntarily modify or discontinue their advertising to meet CARU’s standards that sometimes go beyond existing law. CARU’s twenty-five years of success demonstrates a sustained commitment to effective self-regulation.”

(October 2001)

CARU’s main activities are the review and evaluation of child-directed advertising in all media, including the Internet. CARU’s mission is not only to ensure the truth and accuracy of child-directed advertising, but, because of the inherent susceptibilities of young children, to ensure that advertising to children meets a host of principles and guidelines created to protect children. These precepts are embodied in CARU’s Guidelines, which can be found at www.caru.org.¹⁵ The Guidelines provide, for example, that child-directed advertising should not exploit a child’s imagination, should not depict products used in unsafe ways, should not convey the impression that possession of the product will result in more acceptance of a child by his or her peers, and, when feasible, should promote pro-social behavior, etc. The Guidelines apply to advertising addressed to children under twelve years of age in all media, including print, broadcast and cable television, radio, video, point-of-sale, packaging and online advertising.¹⁶ CARU has an Advisory Board that is composed of leading experts in education, communication, nutrition and child development as well as prominent industry leaders who advise on general issues concerning children's advertising and assist in revisions of the Guidelines.

establish standards for protecting children’s privacy on the Internet, and ultimately helped to provide the basis for the federal Children’s Online Privacy Protection Act of 1998 (COPPA).

¹⁵ When CARU began, it relied on a set of Children’s Advertising Guidelines that were published by the Association of National Advertisers in 1972. In 1975, CARU edited and republished these Guidelines as the *Self-Regulatory Guidelines for Children’s Advertising* (the “Guidelines”). As the need arises, CARU, in consultation with the CARU Advisory Board, revises the Guidelines.

¹⁶ See CARU Guidelines, at Appendix II.

B. Current Developments

The American Obesity Association (AOA) has estimated that 15.5 percent of adolescents (ages 12 to 19) and 15.3 percent of children (ages 5 to 11) are obese.¹⁷ Those figures have more than doubled for children over the last two decades and tripled for adolescents in the same time period.¹⁸ In fact, the current Secretary of Health and Human Services, Tommy G. Thompson, has recently warned that “overweight and obesity are literally killing us.”¹⁹

Clearly, there is no single cause for the rising incidence of childhood obesity and no simple solution. Many factors are involved including, but not limited to, the severe reduction in physical education programs in schools, the replacement of outdoor activities with sedentary activities such as watching television,²⁰ and the over-consumption of food.

The marketers of food products are currently responding to this very serious public health concern. Certain restaurant chains are supplying nutritional information about their meals, including the amount of fat, calories, carbohydrates and fiber. Major food producers have begun removing trans fats from their products and are investing in research to create more nutritionally enhanced foods while at the same time developing cholesterol-lowering ingredients for products such as juice and ice cream.²¹

Industry groups are also actively involved. The President and CEO of the Grocery Manufacturers of America (GMA)²², testified on March 2, 2004 before the Senate Commerce Subcommittee on Competition, Infrastructure and Foreign Commerce, that

¹⁷ American Obesity Association, <http://www.obesity.org>. Body Mass Index (BMI) is a measurement used to identify “overweight” and “obesity.” The Centers for Disease Control and Prevention (CDC) avoids using the term “obesity” for children and adolescents, and instead uses two levels of overweight: the 85th percentile of BMI as an “at risk” level, and the 95th percentile as a more severe level. The AOA uses the 85th percentile of BMI as a reference point for overweight and the 95th percentile for obesity.

¹⁸ According to the AOA, overweight and obesity increase steadily with age.

¹⁹ “Death Rate From Obesity Gains Fast On Smoking,” *New York Times*, March 10, 2004, p.A15.

²⁰ According to “Kids and Media at the New Millennium: A Comprehensive National Analysis of Children's Media Use” (1999), in 1970, six percent of sixth graders had televisions in their bedroom; by 1999, the percentage had grown to 77 percent.

²¹ Deborah Ball, *Wall Street Journal Online*, March 18, 2004, “With Food Sales Flat, Nestle Stakes Future on Healthier Fare.”

²² Manly Molpus

the food and beverage industry is committed to helping reverse the growth of obesity. He noted that the industry was working to improve the nutritional profile of existing products, to provide new products that combine taste, convenience and nutrition, and to promote programs and policies to improve nutrition education and increase physical activity for families, schools and communities. The President and CEO of the Association of National Advertisers (ANA)²³ testified at that same hearing that the non-profit Advertising Council, which provides over one billion dollars worth of public service ads every year, and of which ANA was a key organizer, has worked with the government to develop and present lifestyle messages to educate the public on how to fight obesity, which are now running.²⁴

CARU, as the self-regulatory agency for children's advertising, plays a major role by insuring truthful, non-deceptive advertising to children.

As CARU's record has grown, its case load increasingly included a variety of cases that involve the advertising of food to children. CARU's *Self-Regulatory Guidelines on Children's Advertising* (the "Guidelines") contain several principles and guidelines that either specifically address, or are applicable to, advertising of food to children.²⁵ The relevant sections of the Guidelines are printed below:

C. The Guidelines

Principles

1. Advertisers should always take into account the level of knowledge, sophistication and maturity of the audience to which their message is primarily directed. Younger children have a limited capacity for evaluating the credibility of information they receive....Advertisers, therefore, have a special responsibility to protect children from their own susceptibilities.

4. Recognizing that advertising may play an important part in educating the child, advertisers should communicate information in a truthful and accurate manner...with full recognition that the child may learn practices from advertising which can affect his or her health and well-being.

²³ Robert Liodice

²⁴ CARU acknowledges and applauds the efforts of the Health and Humans Services public service campaigns to educate parents and children about the problems of childhood obesity.

²⁵ See CARU's Self-Regulatory Guidelines on Children's Advertising, at Appendix II.

7. *Although many influences affect a child's personal and social development, it remains the prime responsibility of the parents to provide guidance for children. Advertisers should contribute to this parent-child relationship in a constructive manner.*

Product Presentations and Claims

"...[A]dvertisers need to examine the total advertising message to be certain that the net communication will not mislead or misinform children."

1. *Copy, sound and visual presentations should not mislead children about product or performance characteristics. Such characteristics may include...nutritional benefits.*

2. *The advertising presentation should not mislead children about benefits from use of the product. Such benefits may include, but are not limited to, the acquisition of strength, status, popularity, growth, proficiency and intelligence.*

7. *The amount of product featured should be within reasonable levels for the situation depicted.*

8. *Representation of food products should be made so as to encourage sound use of the product with a view toward healthy development of the child and development of good nutritional practices.*

9. *Advertisements representing mealtime should clearly and adequately depict the role of the product within the framework of a balanced diet.*

10. *Snack foods should clearly be depicted as such, and not as substitutes for meals.*

11. *If objective claims are made in an advertisement directed to children, the advertiser should be able to supply substantiation.*

Sales Pressure

Children are not as prepared as adults to make judicious, independent purchase decisions. Therefore, advertisers should avoid using extreme sales pressure in advertising presentations to children.

1. *Advertisements should not suggest that a parent or adult who purchases a product or service for a child is better, more intelligent or more generous than one who does not. Advertising directed toward children should not create a sense of urgency or exclusivity, for example, by using words like "now" and "only."*

2. *Benefits attributed to the product or service should be inherent in its use... Advertisements should not imply that purchase and use of a product would confer upon the user the prestige, skills or other special qualities of characters appearing in advertising.*

Disclosures and Disclaimers

1. All disclosures and disclaimers that are material to a child should be in language understandable by the child audience, legible and prominent. When technology permits, both audio and video disclosures are encouraged, as is the use of demonstrative disclosures.

Comparative Claims

Advertising which compares the advertised product to another product may be difficult for young children to understand and evaluate. Comparative claims should be based on real product advantages that are understandable to the child audience.

- 1. Comparative advertising should provide factual information. Comparisons should not falsely represent other products or previous versions of the same product.*
- 2. Comparative claims should be presented in ways that children understand clearly.*
- 3. Comparative claims should be supported by appropriate and adequate substantiation.*

Endorsement and Promotion by Program or Editorial Characters

Studies have shown that the mere appearance of a character with a product can significantly alter a child's perception of the product. Advertising presentations by program/editorial characters may hamper a young child's ability to distinguish between program/editorial content and advertising.

- 3. Program personalities, live or animated, should not be used to sell products, premiums or services in or adjacent to programs primarily directed to children in which the same personality or characters appear.*
- 4. Products derived from or associated with program content primarily directed to children should not be advertised during or adjacent to that program.*

Other sections of the Guidelines, such as Kids' Clubs and Premiums, Promotions and Sweepstakes also apply to food advertising.

Most importantly, all of these sections of the Guidelines are an overlay on CARU's primary responsibility, i.e., to ensure that advertising to children is truthful, accurate, not misleading, and does not omit material facts. A cardinal rule of advertising law is that although a claim may be literally true, the context in which it is presented may still cause

it to be misleading to consumers.²⁶ Advertisers must be especially sensitive to this rule when advertising to children.

D. CARU Advertising Review Process

CARU was charged by the children's advertising industry with the responsibility to monitor and review national child-directed advertising for truthfulness, accuracy and conformance with CARU's Guidelines. CARU is recognized as a highly successful self-regulatory body with a success rate of over 95% in resolving issues regarding advertising to children. In a typical month CARU reviews hundreds of child-directed television advertisements as well as radio commercials, print ads and Websites. In addition CARU has been recognized by CyberAngels (the first and largest not-for-profit group to police the Internet to guard the safety and privacy of children online) for its work to help ensure the safety of children on the Internet.

1. Formal Investigations

While CARU occasionally receives consumer complaints and competitor challenges, the preponderance of its cases are initiated through CARU's routine monitoring of advertising in all media, including the Internet. In each proceeding, a CARU attorney or advertising review specialist requests substantiation from an advertiser for claims and/or information and materials establishing compliance with CARU's Guidelines. After reviewing the submission(s) of the advertiser, CARU offers the advertiser an opportunity to meet with the CARU staff member conducting the investigation.²⁷ After reviewing all submissions and any applicable laws and regulations, the CARU staff member, in consultation with CARU's director, makes a determination and in the case of formal inquiries, writes a decision outlining CARU's and the advertiser's positions, summarizing the evidence and reaching conclusions on whether the advertising claims are substantiated and/or whether the advertising complies with CARU's Guidelines.

²⁶ General Mills, Inc. (Total Cereal), Report #4053, *NAD Case Reports* (June 2003).

²⁷ See NAD/CARU/NARB Procedures, at Appendix I.

If CARU finds that a child-directed advertisement does not comply with the Guidelines, or is not truthful or accurate or that a Website operator does not comply with COPPA or CARU's Guidelines relating to children's privacy and safety on the Internet, it recommends that the advertiser (or Website operator) make changes to modify or discontinue the advertising or Website practices. CARU issues press releases for all formal decisions, whether they find the advertisements to be substantiated (or otherwise in compliance with the Guidelines) or non-compliant. While the intent of the press release is not to punish an advertiser or Website operator, it serves as an impetus for advertisers and Website operators to make changes to child-directed advertising.

When CARU issues a formal decision, the Procedures provide that an advertiser that does not agree with CARU's decision and wishes to do so is entitled to appeal CARU's decision to NARB. To date, no formal CARU decision has been appealed. If advertisers refuse to follow CARU's recommendations for change, CARU will refer the case to the appropriate government agency. While this is a rare occurrence, referrals often have serious consequences for advertisers. The FTC, the agency that steps in and can enforce unresolved cases, has stated that cases referred to it by CARU and NAD will go to the top of its list. In fact, several of the cases referred by CARU to the FTC have resulted in consent agreements with the FTC that required the advertiser to pay large fines to the government.²⁸

2. *Expedited Proceedings*

In 1991, a new section entitled "Expedited Procedure" was added to the NAD/CARU/NARB Procedures allowing for the informal closing of cases when advertisers established that the advertising was substantiated within ten business days of the commencement of a CARU inquiry, or made changes to the advertising within that period. By not taking the time necessary to write a formal opinion, or allowing the protracted discussion that had characterized the CARU case process, these "informal inquiries" created an effective way to best utilize CARU's then-limited resources to

²⁸ See FTC Press Release, February 18, 2004 (imposing a \$400,000 fine against UMG Recordings); see also FTC Press Release, October 2, 2001 (imposing a \$30,000 fine against Lisa Frank, Inc.).

review and effectuate rapid changes to the many child-directed advertisements each year. In the two years prior to 1991, CARU completed an average of 19 investigations of advertisements; in the two years following the adoption of the Expedited Procedure, the average number of annual investigations increased to 80. While inquiries resulting in written decisions are published in the Case Reports, those using the Expedited Procedure result in short summaries that are published in the CARU Activity Report section of Case Reports. Since 1975, CARU has completed over 1100 formal and informal (Expedited) inquiries.

E. Food and Nutrition Advertising

Pursuant to its mandate to ensure the integrity of child-directed advertising, CARU has always dealt with cases relating to products that marketers believe are of interest to children, i.e., toys and food. Food includes everything from bread, cereal and restaurant food to snacks, candy and beverages. Despite the joining of the original two categories with others (movies, videotapes, DVDs, video games and Internet sites) over the years, food and toys persist as a mainstay.

The issues addressed in CARU cases and inquiries have been remarkably consistent over the past three decades, and CARU's Guidelines have consistently addressed them. Whether the issue was encouragement of excessive consumption of snack foods, denigration of meals in favor of snack foods, misleading comparisons of nutrient content, exaggeration of the benefits of the product, CARU's case histories demonstrate that through its monitoring CARU has effectively identified food advertising that violated its Guidelines, and encouraged advertisers to voluntarily modify those ads.

1. The 1970's

Between 1975 and the end of 1979, CARU published 79 decisions, 18 of which concerned food related advertising. The majority of the remaining cases concerned toy advertising. The following are representative CARU food cases of that period:

- A television advertising campaign that depicted children and adults engaged in active sports and utilized the theme “Powerful good feeling.” CARU asked the advertiser to substantiate the impression created that one gets an energy lift from eating the breakfast shown, which included depictions of a Cheerios-type cereal, toast and butter, juice or fruit, and a glass of milk. The advertiser provided substantiation indicating that such a breakfast provides appropriate nutritional and energy benefits. CARU also asked the advertiser to provide substantiation that children under age 11 will understand from watching the commercial that one needs to consume the entire meal and not just the Cheerios cereal to gain the benefit promoted. The advertiser was able to present such substantiation and the case was closed.²⁹
- Television advertising for Sunburst Fruit Chews repeatedly stated, “You get a burst of fruit flavor...” and featured large representations of fresh fruit. A super stated that the product was “artificially flavored.” CARU questioned whether there was more natural or artificial flavor. The advertiser provided substantiation that there was more natural than artificial flavor.³⁰
- Comic book advertising for Slim Jim meat snacks stated, “Next time you sit down to a stack of comic books, sit down with a stack of Slim Jim meat snacks.” CARU was concerned that this message had the potential to encourage children to overeat, in violation of its Guidelines. The advertiser agreed to eliminate the advertising copy from future advertisements.³¹
- Television advertising for McDonald’s thick shakes used the term “triple thick” to describe those beverages. CARU asked McDonald’s to provide substantiation for the implied claim that its shakes were three times thicker than “typical” shakes. The advertiser contended that the term was mere puffery. CARU concluded that the claim was objective and required substantiation. The advertiser reported that the advertising had been discontinued.³²
- Comic book advertising for Blammo SugarFree Gum stated, “Ask your mom to buy the money-saving box” and “...No sugar to harm your teeth. OK with moms of the world!” CARU was concerned that the advertisement violated the Guidelines by urging children to ask parents to purchase the gum and by overstating parental approval of gum chewing in general. The advertiser informed CARU that the advertising had been withdrawn for marketing reasons and would not be used in the future.³³

²⁹ General Mills, Inc. (Cheerios, a breakfast cereal), Report # 854, *NAD/CARU Case Reports* (December 1975).

³⁰ Mars Inc., M&M Mars Division (Starburst Fruit Chews), Report # 1106, *NAD/CARU Case Reports* (October 1976).

³¹ Goodmark Foods, Inc. (Slim Jim, meat snacks), Report # 1512, *NAD/CARU Case Reports* (April 1979).

³² McDonald’s Corporation (McDonald’s Restaurants), Report # 1530, *NAD/CARU Case Reports* (April 1979).

³³ Amurol Products Company (Blammo SugarFree Bubble Gum), Report # 1470, *NAD/CARU Case Reports* (December 1978).

- A television advertisement for McDonald's restaurants featured a breakfast consisting of hot cakes with butter and syrup, sausage, orange juice and milk. CARU questioned how it was determined that this was a complete/balanced breakfast for children. The advertiser provided a detailed nutritional analysis conducted by an independent testing facility that established that the combination provided one-third of the U.S. RDA for protein and most of the other major nutrients except for Vitamin A (25% RDA), Iron (15% RDA) and Magnesium (20% RDA). CARU concluded that the claim of providing a complete/balanced meal was substantiated.³⁴
- A television advertisement for Malt-O-Meal cereal featured a young boy named Edgar seated at a breakfast table. An off-camera voice, claiming to be his stomach, tells Edgar he wants Malt-O-Meal. CARU shared the advertisement with its then group of seven academic advisors who were experts in the areas of child psychology, behavior and nutrition. Both they and CARU were concerned that children might be frightened or confused by the use of the strong, authoritative adult voice representing Edgar's talking stomach. The advertiser informed CARU that the advertisement was not intended for children and was not aired during children's programming. However, CARU considered the advertisement as having great appeal to children because it featured a product children consume and used a child actor with whom children can readily identify. The advertiser advised CARU that the commercial's run would soon end and that it would consider CARU's concerns in the future.³⁵

2. *The 1980's*

In the 1980's, the FTC, in its belief that permitting advertisers to compare the benefits of their products to those of competitors would create a more informed public, encouraged advertising that named competitor's products. Gone were the brand Xs and in came brand names. While this new freedom led to many competitor challenges at NAD, very few competitor challenges were received at CARU. Although advertisers did employ comparative advertising in marketing to children in the 1980's, they did so less frequently than adult-directed marketers. Even when child-directed advertisements used comparisons, however, it was CARU, and not competitors, that was likely to challenge the claims.

³⁴ McDonald's Systems, Inc. (McDonald's restaurants), Report # 1333, *NAD/CARU Case Reports* (May 1978).

³⁵ Malt-O-Meal Company (Malt-O-Meal, Hot Wheat Cereal), Report # 1502, *NAD Case Reports* (February 1979).

In the 1980's, CARU published 159 decisions, 16 of which involved food or vitamins.

The following are representative CARU food cases of the 1980's:

- A television advertisement for Halfsies cereal claimed that the product contained “half the sugar of most sugar coated cereals.” CARU asked the advertiser to substantiate this claim. The advertiser provided CARU with data comparing the sugar content of Halfsies with that of 26 leading brands of children's sugar-coated cereals. On the basis of the information received, CARU determined that the claim was substantiated.³⁶
- A comic book advertisement for Oreo cookies contained the line: “Ask mom to buy Oreo cookies!” CARU believed this line placed undue sales pressure on children in violation of the Guidelines. The advertiser stated that use of the line was inadvertent and that it would not be used in the future.³⁷
- A television advertisement for Yoo-Hoo chocolate drink stated: “Which of these leading soft drinks gives you nutrition with vitamins A, B2, C, D, niacin, calcium, phosphorus and potassium? Which soft drink gives you all that, is 99 percent caffeine-free and tastes delicious? Yoo-Hoo. Great taste with nutrition.” CARU was concerned that the advertisement overstated nutritional benefits of the product and did not present the product within the framework of a balanced diet. In response, the advertiser stated that it recognized the role advertising played in the education of a child and stated that it would modify the commercial to include information concerning the importance of a healthy, balanced diet in conjunction with drinking Yoo-Hoo.³⁸
- Television advertising for Cabbage Patch Kids Chewable Vitamins featured an expert who stated: “I recommend new Cabbage Patch Kids Chewable Vitamins because they are naturally flavored with fruit juices and contain no table sugar. No salt, no artificial colors or flavors.” The same expert was quoted in a signed statement on the package labeling: “I urge parents to provide their children with vitamins in a form as natural as possible. The advantage of Cabbage Patch Kids Chewable Vitamins is that they are in the purest possible form....” A competitor questioned the accuracy of the description of the ingredients and the exclusivity claims. The challenger also stated that the placement of the advertising in children's programming was in conflict with the industry practice by which drugs and nutritional supplements are not advertised directly to children. After contacting the advertiser, CARU was told that advertising directly to children had been permanently discontinued. Though the advertiser did not provide substantiation for the technical claims, CARU learned that the marketing of the product had ceased and the advertising had been permanently discontinued.³⁹

³⁶ The Quaker Oats Company (Halfsies cereal), Report # 1657, *NAD/CARU Case Reports* (April 1980).

³⁷ Nabisco Brands, Inc. (Oreo Chocolate Sandwich Cookies), Report # 2199, *NAD/CARU Case Reports* (July 1984).

³⁸ Yoo-Hoo Chocolate Beverage, Corp. (Chocolate Beverage), Report # 2731, *NAD/CARU Reports* (September 1989).

³⁹ Pharmed Laboratories (Cabbage Patch Kids Chewable Vitamins), Report # 2368, *NAD/CARU Case Reports* (February 1986).

- A television advertisement for General Foods' Super Sugar Crisp Cereal focused primarily on the cereal without emphasis on the other components that contribute to a balanced meal. CARU found that despite the presence of an audio statement, "Part of this nutritious breakfast," a more focused visual reference was necessary to sufficiently communicate the message. The advertiser advised CARU that the commercial had been discontinued.⁴⁰
- Television advertising made the claim, "In a survey, kids with a preference preferred Peter Pan's taste over Jif or Skippy." CARU questioned the accuracy of the claim. The advertiser submitted the results of blind product comparison testing of Peter Pan Peanut Butter vs. Skippy Peanut Butter and Peter Pan Peanut Butter vs. Jif Peanut Butter. The findings indicated that children tested preferred the taste of Peter Pan over Jif or Skippy at a 99% confidence level. CARU found that the advertisement had been substantiated.⁴¹
- Comic book advertising for General Mills cereals featured a premium offer for PrestoMagix Dry Transfer Games. CARU was concerned that the advertisement placed too much emphasis on the premium in violation of the Guidelines, which recognize that premiums have a potential to greatly enhance the appeal of the product to children, and, therefore, special care should be taken to ensure that the primary emphasis is on the product itself. After being informed of CARU's concerns, the advertiser stated that it agreed with CARU's position and would not run the advertising again.⁴²
- A television advertisement for Flintstones Vitamins by Miles Inc., which aired during "The Flintstones" cartoon show, featured children at a playground and a musical soundtrack: "We are the Flintstones kids, ten million strong and growing." CARU suggested that the message might be overwhelming when directed to a young audience, noting that advertisements should not imply that purchase and use of a product will confer on the user the prestige, skill or other special qualities of the characters appearing in the advertising. CARU was also concerned that the commercial violated industry practices by placing advertising for vitamins in or adjacent to children's programming, and noted that children are likely to imitate product demonstrations without regard to risk. Further, CARU was troubled by the airing of the commercial during the "Flintstones" program in violation of both CARU's and the FCC's host-selling proscription. When informed of CARU's concerns, the advertiser responded that the advertisement appeared during the "Flintstones" in error, that it continues to adhere to the Guidelines and that it has taken steps to ensure that this incident would not be repeated.⁴³

⁴⁰ General Foods Corporation (Super Sugar Crisp Cereal), Report # 2014, *NAD/CARU Case Reports* (November 1982).

⁴¹ Swift & Company (Peter Pan Peanut Butter), Report # 1539, *NAD/CARU Case Reports* (March 1980).

⁴² General Mills, Inc. (Cereals, with PrestoMagix Dry Transfer Games premium offer), Report # 1704, *NAD/CARU Case Reports* (July 1980).

⁴³ Miles Inc. (Flintstones Vitamins), Report # 2551, *NAD/CARU Case Reports* (December 1987).

- A television advertisement for Planters Lifesavers Company's Fruit Juicers Candy depicted children dancing on a beach while a jingle claimed, "Here's something new and juicy..." "...with the juice of Fruit Juicers candy..." and "...real juice means a hole-lotta fun." The visual featured juice squirting out of the package and children "drinking" the candy from the package through a straw. CARU was concerned that the commercial might lead children to believe that the candy contains a liquid center and violated the Guidelines which state that advertising should not mislead children about a product's characteristics. The advertiser contended that children knew that Life Savers have holes and the repeated shots of the candy's shape, circular with a hole, clearly communicated the type of product advertised. CARU disagreed, stating that the repeated use of the phrase "new and juicy" might lead children to believe the candy is different from standard Life Savers, especially in a market where many similar products do contain a liquid within the candy. The advertiser informed CARU that the commercial was no longer running and that it would take CARU's concerns into consideration when developing future advertising.⁴⁴

3. *The 1990's*

CARU instituted its "Expedited Procedure" in 1991 to more efficiently investigate a greater number of child-targeted advertisements. This procedure, predicated on a prompt and cooperative response from the advertiser, provides for a summary of the inquiry to be reported in the CARU Activity Report section of the Case Reports.⁴⁵ To qualify for this treatment, an advertiser must either modify its advertising or demonstrate that the advertising is substantiated within a ten-business-day period. In the 1990's, the results reported for what became known as "informal cases" or "informals" were very brief and without much detail. It is therefore very difficult to determine if the Informals actually concerned nutrition and what issues were involved. During the 1990's, CARU published 48 formal cases, 4 of which involved food and 434 informal cases, 50 of which involved food-related advertising. The formal decisions are summarized as follows:

- A television commercial for General Mills' Apple Cinnamon Crunch cereal was brought to CARU's attention by the Department of Telecommunications at Indiana University, which had conducted a research study on advertising directed to children. The commercial featured a man, woman and toddler waking up in the morning. A voice-over sang a song about the cereal and its ingredients as the items appeared on the screen. The commercial did not depict the cereal as an item in a nutritionally balanced breakfast, and, therefore, did not include a complete breakfast disclosure. CARU's Guidelines require that representations of food should be made so as "to encourage sound use of the product with a view toward healthy development...of good nutritional practices" and also require that

⁴⁴ Planters Lifesavers Co. (Fruit Juicers Candy), Report # 2708, *NAD/CARU Case Reports* (June 1989).

⁴⁵ *See*, NAD/CARU/NARB Procedures, at section 2.12.

mealtimes depictions “should clearly and adequately depict the role of the product within the framework of a balanced diet.” After being contacted by CARU, the advertiser responded that this commercial was intended for adult audiences and was erroneously placed during children’s programming. The advertiser stated that it supports the Guidelines and will make sure such mistakes do not occur in the future.⁴⁶

- Television advertising for Kellogg’s Frosted Flakes depicted a group of boys choosing teams for a game of kickball. The leader of one team says to the boys on the other team, as he pushes a new boy to the other side: “You guys can have the new kid. We don’t want him. You’re stuck with him.” The new boy is then comforted by Tony the Tiger who tells the boy he will “show ‘em. But first let’s start with a complete breakfast including my Frosted Flakes.” After eating breakfast, the boy is shown joining the game, being successful and being accepted by the other boys. CARU was concerned that the commercial implied that eating the cereal was an influential factor in gaining the boy’s acceptance, in violation of the Guidelines, which state that advertisements should not convey the impression that possession of a product will result in more acceptance of a child by his or her peers. The advertiser disagreed, stating that the boy was only accepted on the basis of skill alone. CARU concluded that the advertisement improperly conveyed the message that eating the cereal was related to the boy’s acceptance. The advertiser informed CARU that the commercial had completed its flight and the company had no intentions to run it in the future.⁴⁷
- A television advertisement for Campbell Taggart Company’s Iron Kids Bread, which was brought to CARU’s attention by a consumer complaint, depicted a mother and son asking, “Have you ever seen a kid eat wheat bread?” and then answering, “I only know one kid who eats wheat bread,” as a visual appears of a little girl wearing glasses. The boy then states, “What a little dork.” CARU found that the commercial violated CARU’s Guidelines because it implies that children who eat whole wheat bread, a good source of nutrition, will not be accepted by their peers and also because the advertisement did not attempt to encourage positive social behavior and respect for others. The advertiser responded that CARU’s Guidelines are subjective and that it had received only a few complaints regarding the inappropriateness of the message of the advertisement. It also argued that the creative approach to the commercial was the same seen by children in movies and sitcoms every day and should therefore be considered acceptable practice. CARU noted that its jurisdiction was advertising, not programming, and that the advertiser had provided no research to substantiate its position concerning how children understand the commercial. CARU concluded that the advertisement should be discontinued. The advertiser advised CARU that the flight had ended and that it would take CARU’s concerns into consideration in future advertising.⁴⁸

⁴⁶ General Mills, Inc. (Apple Cinnamon Cheerios Cereal), Report # 2810, *NAD/CARU Case Reports* (August 1990).

⁴⁷ Kellogg Company (Frosted Flakes Breakfast Cereal), Report # 2827, *NAD/CARU Case Reports* (October 1990).

⁴⁸ Campbell Taggart, Inc. (IronKids Bread), Report # 3132, *NAD/CARU Reports* (August 1994).

- Television advertising for Denny’s Flintstone’s Fun Meals Premium featured the Flintstone’s Mini-Cars, the premium toy offered with the meal, but had no visual presentation of either the Fun Meal offered or the restaurant itself. CARU found that the advertisement violated the section of *Guidelines* that states: “If product advertising contains a premium message, care should be taken that the child’s attention is focused primarily on the product. The premium message should be clearly secondary.” The advertiser advised CARU that the advertisement was no longer airing and agreed to make modifications in future advertisements.⁴⁹

4. *The 21st Century*

At the beginning of the new century, CARU turned its attention to a new medium, the Internet, directing most of its energies to protecting the safety and privacy of children surfing the Web. Now that many advertisers are in compliance with CARU’s guidelines and COPPA, CARU is focusing more of its efforts on food advertising to children. From 2000 through 2003, 54 of the 301 informal cases published involved food advertisers.⁵⁰ In the same period, CARU published 137 formal cases, 19 of which involved food advertisers. Examples of some recent formal cases relating to food advertising are described below:

- Website advertising for Ferrero USA’s Nutella that truthfully compared the fat and sodium content of the advertised food with a similar food product, but which failed to compare the sugar content of each, was found to have the capacity to mislead children about the overall dietary benefits of the two products.⁵¹ The advertiser modified the advertisements.
- A print advertisement for a Bagel Bites online auction sponsored by H.J. Heinz Company stated, “The more you scarf, the better your chances!” was considered to be in violation of section 8 of the Guidelines’ section entitled “Product Presentation and Claims.”⁵² The advertiser eliminated the quoted line.
- An advertisement for Procter & Gamble’s Sunny D Citrus Punch that showed the advertised drink breaking out of a concrete block and stated, “It’s the power of the sun,” was deemed to create the impression that consumption of the product would

⁴⁹ Denny’s (Flintstone’s Fun Meals Premium), Report # 2826, *NAD/CARU Reports* (October 1990).

⁵⁰ In order to provide greater guidance to the industry, CARU has recently expanded its reporting of informal inquiries to include more details.

⁵¹ Ferrero U.S.A., Inc. (nutellausa.com), Report # 3847, *NAD/CARU Case Reports* (December 2001).

⁵² H.J. Heinz Company (Bagel Bites Extreme Redeem online Auction), Report # 4011, *NAD/CARU Case Reports* (February 2003).

give a child strength, thereby misleading children about the benefits of the product.⁵³ The advertiser modified the commercial.

- Two advertisements for Kentucky Fried Chicken, one that truthfully stated that one breast contained “just 11 grams of carbs and packs 40 grams of protein,” and the other, that claimed, in part, that two of the chicken breasts have less fat than a specified fast food burger, were found to have the capacity to mislead children about the nutritional benefits of fried chicken, despite the fact that each commercial contained a super stating “Not a low sodium, low cholesterol food.”⁵⁴ The advertiser discontinued the advertisements during children’s programming.

CONCLUSION

CARU believes that its current Guidelines, as illustrated by the cases cited above, adequately address the advertising of food to children. Education of the industry concerning CARU’s interpretation of those Guidelines, as reflected in this paper, is an important step toward achieving better understanding of the role of self-regulation.

⁵³ Procter & Gamble (Sunny D Citrus Punch), Report # 4040, *NAD/CARU Case Reports* (May 2003).

⁵⁴ KFC Corporation (KFC Commercials), Report # 4122, *NAD/CARU Case Reports* (December 2003).

HISTORICAL OVERVIEW OF NAD CASES ON FOOD, NUTRITION AND WEIGHT LOSS CLAIMS

A. Background

NAD's mission is to ensure the integrity of advertising by monitoring and reviewing national advertising for truthfulness and accuracy. The benefits that flow from the system extend to consumers, advertisers, and government alike and foster healthy competition. Truthful and accurate advertising provides consumers with information they can rely upon to make good purchasing decisions for themselves and their families. A self-regulatory system provides advertisers with a cost effective forum where competitors can obtain prompt rulings on advertising challenges helps ensure a level playing field for honest competitors. Lastly, effective self-regulation frees government regulators to devote their limited resources to those who engage in deliberate deception or endanger the health and safety of consumers.

B. NAD Advertising Review Process

The advertising industry charged NAD with the responsibility of monitoring and reviewing national advertising for truthfulness and accuracy. Now in its third decade, NAD has surpassed all expectations. It has gained respect and recognition from both federal agencies and state governments; it has become a model for cost-effective, objective, and efficient self-regulation; and it has enjoyed an outstanding level of voluntary compliance by the advertising industry.

In the early years, the bulk of NAD's cases were brought by consumer advocacy groups and through NAD's own monitoring efforts, but today, the majority of NAD's cases come from challenges filed by competitors. Complaints are also brought to NAD by trade associations, advocacy groups, consumers, local BBBs and from NAD's routine monitoring program. NAD's experienced legal staff has expertise in claim substantiation, advertising and trade regulation, consumer perception and survey evidence, and litigation and arbitration.

In each advertising review proceeding, an NAD attorney conducts a fact finding that includes a review of all of the evidence submitted, an analysis of each party's legal arguments and substantiation, and then meets (separately) with the challengers and the advertisers (their company representatives, attorneys and/or experts) to assure a complete understanding of the record. The full text of NAD's Procedures is available on-line at www.nadreview.org. The process is designed to be user friendly. While many parties choose to be represented by an attorney, counsel is not required and anyone can appear before NAD.

Upon the close of the evidentiary record, the case moves to the decision phase. The NAD attorney, in consultation with NAD's Director, reviews the entire record, makes a determination and then drafts a decision outlining the advertiser's and challenger's positions, summarizing the evidence produced and reaching conclusions on two fundamental questions:

- 1) What are the reasonable express and implied messages conveyed by the advertising?; and
- 2) Is the evidence in the record sufficient to support the messages conveyed by the challenged advertising?

NAD's purpose is not to punish or even to ascertain whether any law has been broken. Rather, NAD simply examines the messages conveyed by the challenged claims in the context in which they appear and analyzes the evidence submitted to determine whether there is a good "fit" between the two. If NAD determines that a claim has not been substantiated, NAD recommends that the advertiser either modify or discontinue it. Since 1971, more than 4,050 cases have been handled through NAD's self-regulatory process, and almost all of the advertisers who participate (95%) comply with NAD's recommendations—an extraordinary record of voluntary industry compliance.

Advertisers not satisfied with an NAD recommendation can appeal to the NARB. Of the more than 4,050 cases that have been handled by NAD to date, only 123 have gone to the NARB for appellate review—a tribute to the thoroughness and perceived fairness of the NAD review process.

Although the self-regulatory forum cannot compel an advertiser to participate in a review proceeding or to comply with an NAD decision the system does have “teeth” in the form of the back up and support NAD receives from the Federal Trade Commission and other regulatory agencies that have oversight authority over advertising. If an advertiser elects not to participate or comply, NAD is empowered to issue a press release, publicly announcing the advertiser’s non-compliance, and refer the matter to a government agency (most often the FTC) for possible law enforcement action. The FTC is extremely supportive of advertising self-regulation and wants this system to work. Consequently, when NAD refers a case to the FTC it receives top priority. Many advertisers, faced with the possibility of a federal prosecution, elect to return to the self-regulatory forum. Those who do not risk becoming subject to FTC Consent Orders, civil penalties, court ordered injunctions and bond requirements.

NAD Case Reports

NAD's cases are published 10 times a year in the Case Report. Although NAD's decisions focus on the facts and advertising at issue in a particular case, they also provide an in-depth analysis of claim support and advertising law. In comparison, the FTC shares little of its evidentiary reasoning in its consent orders, and there are few court opinions where claim support is closely examined or discussed. Consequently, NAD’s decisions have become an important educational tool for businesses, marketers and attorneys interested in claim substantiation principles and their application in a variety of different advertising contexts. NAD’s decisions, therefore, have a lasting benefit far beyond the impact of any single case. A complete archive of NAD’s decisions is now available on-line, by subscription, at www.nadreview.org.

C. Food, Health, Nutrition and Weight Loss Advertising

NAD has a long history of cases involving food, health, nutrition and weight loss advertising. Over the past 32 years, NAD has handled approximately 675 cases involving food advertising (including 23 NARB Appeals), 110 cases involving nutrition claims, 353 cases involving general health claims (72 of which are directly related to food), and 59 cases regarding products and services promising weight loss. Although

many of these cases also involve taste (sensory perception), consumer preference or sales claims, NAD has grappled with food-related nutrition and health issues since its inception. Further, NAD's decisions have provided consistent and timely guidance to the food industry as the regulatory and legal landscape has changed over the years. Almost all of the advertisers who participate (95%) comply with NAD's recommendations.

1. *The 1970's*

The first challengers to embrace the self-regulatory forum were consumer advocacy groups. In 1972, the Consumer Federation of America (CFA) challenged claims in a television commercial for Miles Laboratories' One-A-Day Vitamins+Iron. The complainant, maintaining that the advertising was misleading, argued that "the advertising implies that regardless of what one eats, taking this pill will ensure that the body gets all the iron it needs..." and questioned whether it is "in the best interests of the public to encourage reliance on a pill to meet nutritional needs rather than a thoughtful selection of a balanced diet." Both the NAD and the NARB considered this issue and determined that the advertising was not misleading because the need for iron supplementation by women of childbearing age had been well-established and the risk of harm through overdose, by women generally, as a result of the advertising, was remote. However, NARB recommended that, in the future, more attention be given to targeting this advertising to the specific audience for the product, rather than addressing the commercial to all women regardless of age or condition.⁵⁵

NAD also focused its own monitoring efforts in the 1970's on food and nutrition claims. For example, NAD requested that the Sugar Association provide substantiation for its claims "Sugar, It isn't just good flavor, it's good food." Noting that the advertising campaign was prepared as part of an effort to provide nutritional guidance on the role of sugar in children's diets, both NAD and NARB found the claims to be unsubstantiated after hearing testimony from experts who persuaded them that the definition of "good food," and of sugar in particular, is a controversial subject. The advertising, however, gave no hint of this controversy, or of the fact that nutritionists do not agree on the

⁵⁵ Miles Laboratories (One-A-Day Vitamins + Iron), Report # 201, *NAD Case Reports* (December 1, 1972); NARB # 12 (May 30, 1973).

nutritional benefits of sugar, beyond energy and flavor. Further, the self-regulatory forum found the statement “Sugar isn’t the only nutrient in an ice cream cone” to be inaccurate and misleading because it implied that sugar is a “nutrient,” noting that while nutritional experts agree that sugar provides calories there is no evidence that it is considered a nutrient.⁵⁶ Throughout the 1970’s, NAD reviewed a stream of cases involving food, health and nutrition including:

Consumer Advocate and NAD Monitoring Cases

- Advertising for “Egg Beaters,” a no cholesterol egg substitute, stated that members of the American College of Cardiology urge Americans to “eat well-balanced diets low in cholesterol and saturated fat.” NAD found the claim to be supported based on excerpts from a report of the Inter-Society Commission for Heart Disease Resources and a publication by the American Heart Association, both stressing the importance of diets low in cholesterol and saturated fat.⁵⁷
- Print advertising for Elaine Powers Figure Salons claimed “Dieting didn’t help much” and “I tried diets but always gained everything back.” NAD determined that these claims would tend to mislead consumers by implying that exercise alone would lead to weight loss without a simultaneous reduction in caloric intake. The advertiser agreed to discontinue these claims and include a reference to “sensible eating suggestions” as part of a weight reduction program in future advertising.⁵⁸
- A jingle stating “Even kids with chicken pox” eat Armour hot dogs was challenged by an individual concerned that the advertisement might induce a child sick with chicken pox to demand, to his detriment, to eat hot dogs. NAD dismissed the complaint based on evidence from two medical practitioners who stated that they saw no potential harm in a child eating hot dogs while recuperating from chicken pox.⁵⁹
- Advertising for peanut butter claimed “With today’s prices, more and more shoppers are switching to peanut butter. And why not? Ounce for ounce, peanut butter provides about as much protein as lean hamburger.” NAD found the nutrient evidence submitted by the advertiser adequately supported the claim. However, because the commercial pictured a shopper buying her peanut butter from a butcher, asking for “a nice portion of Skippy Peanut Butter,” and the

⁵⁶ The Sugar Association, Inc. (sugar), Report # 387, *NAD Case Reports* (May 1, 1973); NARB # 14 (October 24, 1973).

⁵⁷ Standard Brands, Inc. (Fleischmann’s Margarine and Egg Beaters egg substitute), Report # 636, *NAD Case Reports* (June 1, 1974).

⁵⁸ Elaine Powers Figure Salons (figure salons), Report # 643, *NAD Case Reports* (August 12, 1974).

⁵⁹ Armour Foods Company (frankfurters), Report # 429, *NAD Case Reports* (February 1, 1973).

butcher saying “more and more shoppers are switching to peanut butter,” NAD determined that the commercial conveyed an implied message that consumers should eat peanut butter instead of meat, rather than the advertiser’s intended message to use peanut butter as a nutritious and economical alternative for a limited portion of one’s daily meat category intake as recommended by the U.S. Department of Agriculture, Bulletin No. 183.⁶⁰

- Print claims for low fat milk promised “27% more calcium, 89% more vitamin A, 28% more thiamine, 27% more riboflavin, 25% more protein than whole milk.” The advertiser’s percentages were obtained by comparing Light n’ Lively low fat milk to whole milk as defined under a Federal Standard of Identity issued by the FDA. NAD held that the Federal Standard of Identity was a reasonable base against which an advertiser could compare its low fat product, despite any minimal variations which may occur between whole milk products on the market.⁶¹
- Print advertising with a prominent headline “A slimmer you...begins with your next bath” followed by: “Slimmers Glove System beautifies your skin...reduce hard-to-lose fatty deposits clinging to your waistline, hips and thighs...and do it simply beginning with your next bath” and “Lose inches...Lose Pounds.” NAD determined that the reference in the copy to diet, massage and exercise as part of the “System” was overshadowed by the headline and the name of the system, creating the false impression that one could “lose inches and pounds” without dieting and exercise.⁶²
- Print advertising with the headline: “3 Famous Fat-Melters Kelp, Lecithin, Vitamin B6, Plus B Complex All in One Tiny Dynamite Tablet,” followed by the statement, “You can lose 12 pounds in 2 weeks without a single hunger pang!” Although “Diet” was mentioned as part of the program, NAD determined that the reference was overshadowed by the prominence given to Kelp, Lecithin and Vitamins as “fat melters,” creating a misleading impression that they are the chief factors in the weight reduction plan. Noting that medical authorities hold that vitamins have no slenderizing properties whatsoever, and play no part in the actual weight loss, NAD found the message conveyed by the advertisement to be unsupported.⁶³
- Print claim: “Kretschmer Wheat Germ. The world’s most nutritious natural cereal.” The advertiser provided the results of a nutritional analysis of available grain products based on a 100 calorie portion of each product. Results showed Kretschmer Wheat Germ was nutritionally superior in all but a few isolated single nutrients that were more available through other grain products. The advertiser also produced evidence that Kretschmer was nutritionally superior to the most

⁶⁰ CPC International Inc., Best Foods Division (Skippy Peanut Butter), Report # 648, *NAD Case Reports* (September 10, 1974).

⁶¹ Kraftco Corporation - Sealtest Foods Division (Light n’ Lively, lowfat milk), Report # 671, *NAD Case Reports* (October 10, 1974).

⁶² Weider Health And Fitness, Inc. (Slimmers Glove System), Report # 832, *NAD Case Reports* (April 15, 1975).

⁶³ American Consumer, Inc. (Health Watcher Diet), Report # 851, *NAD Case Reports* (May 15, 1975).

popular cereal products produced from these grain substances and the four leading “natural” breakfast cereals. Therefore, NAD concluded that the claim was substantiated.⁶⁴

- A television commercial showed a woman tapping a competitive product and saying: “You know, I’ve been using this mayonnaise as long as I can remember. But now I’ve switched to Bright Day”; “It’s amazing, Bright Day is every bit as good as this mayonnaise” and it offers “the great taste of real mayonnaise, with no cholesterol.” Although Bright Day was pictured in the commercial, NAD determined that the words “Imitation Mayonnaise Dressing” on its label might not be discernible on the average television screen, thus leaving the misimpression that “Bright Day” was real mayonnaise. The advertiser agreed to modify the commercial by including the words “Imitation Mayonnaise” in the audio portion of the commercial.⁶⁵
- Print advertising for King-of-All-Berries claimed: “Twice As Big, Twice As Tasty as regular garden strawberries”; “So huge and meaty, just 3 sliced-up berries fill a bowl.” “As big as peaches—just 60 days from now.” NAD determined that the advertisement implied that King-Of-All-Berries strawberries were superior to all other strawberry plants. The advertiser provided a USDA Agricultural Research Service Report, as well as a strawberry plant nursery report, which described the “Fort Laramie” strawberry. NAD found this evidence to be insufficient to support these claims because no direct comparison was made between the “Fort Laramie” strawberry and regular garden strawberries.⁶⁶
- A television commercial stated “Sizzlean is 50% leaner than bacon.” The advertiser explained that this is a new meat product made from trimmed pork which has been cured, chopped, formed and sliced into uniform strips. Results of laboratory analyses of Sizzlean and 16 leading brands of bacon established that the average leanness (percentage of product which is not fat) of raw bacon is 38.3% while Sizzlean had an average leanness of 59.6%, or 55.6% leaner than average raw bacon. With allowances for the variability that occurs in regular bacon, NAD determined that the 50% claim was adequately supported.⁶⁷
- Magazine advertising for California raisins claimed: “The kids didn’t believe that I got snacks anytime I wanted. So I proved it. I invited them over and we all had raisins.” A similar advertisement claimed: “Julie thinks her grandmother’s a real pushover because whenever she asks for snacks I give her all she wants. Of course, I always give her raisins.” NAD was concerned that these advertisements conveyed the implied message that parents can allow their children to eat raisins without the restraint that would be typically be shown with more traditional snack foods. While the advertiser provided information demonstrating that raisins have

⁶⁴ International Multifoods (Kretschmer Wheat Germ), Report # 868, *NAD Case Reports* (September 15, 1975).

⁶⁵ United Food Industries, Inc. (Bright Day Imitation Mayonnaise), Report # 875, *NAD Case Reports* (January 15, 1976).

⁶⁶ American Consumer, Inc. (King-Of-All-Berries, strawberry plants), Report # 1079, *NAD Case Reports* (September 15, 1976).

⁶⁷ Swift And Company (Sizzlean), Report # 1214, *NAD Case Reports* (July 15, 1977).

a nutritional advantage over 16 other snacks, NAD noted that it is well-established that raisins may pose dental risks because of their stickiness and high sugar content. NAD believed that parents might, therefore, want to control their intake. Further, in recognition of good dietary habits, NAD noted that parents may want to control their children's intake of any kind of food regardless of nutritional or dental "advantages or disadvantages."⁶⁸

On August 13, 1979 the Federal Trade Commission issued a "Statement of Policy Regarding Comparative Advertising" clarifying its position on comparative advertising. The Commission's staff first conducted an investigation of industry trade associations and the advertising media regarding their comparative advertising policies. In the course of this investigation, numerous industry codes, statements of policy, interpretations and standards were examined. The FTC found that many of the industry codes and standards contained language that could be interpreted as discouraging the use of comparative advertising, which it defined as advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information.

The Commission issued this Policy Statement to make it clear that it was the FTC's position that industry self-regulation should not restrain advertisers' use of truthful comparative claims. The FTC opined that comparative advertising, when truthful and non-deceptive, can be a source of important information to consumers and assist them in making rational purchase decisions. Further, FTC asserted, comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace. With the issuance of this Policy Statement, "Brand X advertising" took its place in the annals of advertising history and a new chapter opened for the advertising industry and its self-regulatory forum.

2. *The 1980's*

In the 1980's, comparative advertising came into vogue, and although consumer advocates continued to file challenges and NAD continued its monitoring efforts, there was a surge of cases brought by individual competitors and trade groups whose products became the target of comparative claims. Nevertheless, the cases that were brought

⁶⁸ California Raisin Advisory Board (Raisins from California), Report # 1323, *NAD Case Reports* (June 15, 1979).

raised interesting and novel issues and brought new industries (e.g., manufacturers of artificial sweeteners and baby foods) to the self-regulatory forum. The following are representative NAD food cases during the 1980's:

a. NAD Monitoring Cases

- Television advertising for Wonder Bread claimed: "Nutrition that whole wheat can't beat...Wonder Bread has virtually the same amount of the most significant nutrients found in 100% whole wheat." A visual showed that enriched white Wonder Bread and whole wheat bread have essentially the same nutritional value with respect to eight nutrients: thiamine, riboflavin, niacin, protein, vitamin A, vitamin C, iron and calcium. NAD questioned whether the claims might mislead by omission and imply that Wonder Bread is nutritionally equivalent to whole wheat bread in every respect. While the investigation was in progress the advertiser discontinued the advertising.⁶⁹
- Television advertising for Golden Griddle syrup claimed: "The Golden Griddle breakfast contains 40% more protein. Golden Griddle makes good nutrition delicious." NAD expressed concern that the reference to the "Golden Griddle breakfast" might give consumers the misleading impression that pancake syrup is a source of protein. The advertiser produced evidence that a breakfast, consisting of three Golden Griddle 4-inch pancakes, 4 tablespoons syrup, one pat margarine, 8 ounces whole milk, 6 ounces orange juice, contains 16 grams of protein or 35% of the U.S. Recommended Daily Allowance while the "typical" breakfast consists of 6 ounces orange juice, one ounce pre-sweetened cereal, 8 ounces whole milk and contributes 11 grams of protein or 25% of the RDA. While accepting the nutritional accuracy of this data, NAD determined that the claim "40% more protein" overstated the extent of the protein difference between the two breakfasts and held that it was inappropriate to attach a protein claim to Golden Griddle syrup since pancake syrup is not a source of protein and makes no significant nutrient contribution, other than calories, to the "Golden Griddle breakfast."⁷⁰
- A series of magazine advertisements with the headline "Would this body lie to you?" featured actress Angie Dickinson holding an avocado slice on the end of a fork and claimed "California Avocados. Only 17 calories a slice" and "Vitamins A, B-1, C, E, plus potassium." NAD requested nutrient data and questioned the actual size of a 17 calorie slice and the serving size of avocado that would provide sufficient amounts of vitamins and potassium to justify the nutritional claim. The advertiser produced evidence that one serving (one-half of an avocado) provides approximately 10% of the RDA of vitamins A, B-1, C, and E and is also a significant source of potassium. This same serving contains 132 calories. Thus, a "17 calorie slice" would represent 1/16 of an avocado. NAD determined that the

⁶⁹ ITT Continental Baking Co., Inc. (Wonder Bread), Report # 1756, *NAD Case Reports* (November 17, 1980).

⁷⁰ CPC International, Inc. (Golden Griddle Pancake Syrup), Report # 1946, *NAD Case Reports* (September 15, 1982).

advertiser should clearly disclose that the “only 17 calories a slice” claim is based on 1/16 of an avocado and qualify the nutrient claims “vitamins A, B-I, C, E, plus potassium” as being based on one half of an avocado.⁷¹

- Magazine advertising for Stouffer’s frozen entrées featuring varieties of fresh onions claimed: “A True Health Food. For centuries, the mysterious onion has been credited with nutritional as well as medicinal properties, for it is a salutary source of iron, calcium, potassium, protein, B-vitamins and vitamin C. One medium onion delivers as much vitamin C as a ripe Florida orange, yet it contains only 38 calories.” The advertiser identified *USDA Handbook No. 8* as the source of the nutritional claims. NAD noted that the data indicated the raw onion, while indeed a significant source of vitamin C, contains less than an orange. With respect to the other vitamins and minerals identified in the advertising, NAD determined they were not present at a sufficient level to provide a significant contribution to the diet. Lastly, NAD noted that Stouffers entrées are cooked and some list dehydrated onion as an ingredient. Consequently, NAD questioned whether data for the fresh, raw vegetable was applicable at all.⁷²
- Magazine advertising for Florida grapefruit juice claimed, “To your health...It’s sodium free and full of potassium, a combination that helps control blood pressure.” A second advertisement headed “To your health! Putting back what exercise takes away” claimed, “It’s high in potassium. The one thing active people can’t get enough of in their diets. Potassium balances sodium levels to regulate blood pressure and fight off fatigue.” The advertiser based its potassium deficiency claims on an opinion survey of athletes and a study of the effects of intense conditioning in young men undergoing basic military training. A survey of literature regarding the roles of sodium and potassium in controlling blood pressure was also submitted. NAD determined that data obtained from studies on athletes and military men could not support broad claims directed to the general public and expressed concern that the advertisement overstated the benefits of drinking grapefruit juice when consumed in normal quantities.⁷³
- Newspaper advertising for Sweet Healthin with the headline, “Sodium free, Aspartame free,” claimed several health advantages including: “No sugar... Without the problems of high calorie sweeteners...No sodium...That’s why Sweet Healthin is better for overweight people, diabetics, and people with high blood pressure or heart disease than low-calorie sweeteners with sodium.” A consumer questioned whether the sweetener contained saccharin and, if so, why this was not disclosed. The advertiser explained that Sweet Healthin contains calcium saccharin while most non-nutritive sweeteners contain sodium saccharin. The advertiser also provided labels bearing the required health warning. NAD

⁷¹ California Avocado Commission (California Avocados), Report # 1775, *NAD Case Reports* (February 16, 1981).

⁷² Stouffer Foods Corporation (Prepared Entrees), Report # 2340, *NAD Case Reports* (December 16, 1985).

⁷³ Florida Citrus Commission (Grapefruit Juice), Report # 2486, *NAD Case Reports* (April 20, 1987).

expressed concern that, in light of the health claims, the failure to disclose that Sweet Healthin contains saccharin might prove misleading.⁷⁴

b. Competitor Challenges

- A television commercial showed young children eating fish sticks while the audio stated: “It’s naturally high in protein...naturally low in calories...and now it’s coated with real oven-baked breadcrumbs.” A competitor challenged the accuracy of the nutritional claims for fish sticks, which are breaded and fried in oil. The advertiser provided the calorie and protein content for Mrs. Paul’s Fish Sticks as disclosed on package labeling. For comparison, it also provided calorie or protein contents for menu alternatives including foods positioned for children and those commonly accepted as low in calories and/or high in protein. NAD determined that it was inappropriate to treat the advertising claims as if they were comparative in nature. Further, NAD recommended that the claims for “high in protein...low in calories” be strictly confined to the fish ingredient because the addition of breading and oil altered its nutritional profile.⁷⁵
- Television advertising claimed: “Once upon a time in the land of jams and jellies mostly sugar and empty calories were filling our children’s bellies. But then we the people at Sorrell Ridge took away all the sugar and additives. And added fruit. More than six times the fruit by far. See? We say ‘fruit only’ right on our jar.” The International Jelly & Preserve Association questioned these claims and provided laboratory analyses indicating that the products, which are sweetened with fruit juice concentrate, contain no more fruit solids than and essentially the same sugar content as standardized products. The advertiser provided calculations showing that one pound of conserve would contain sweeteners and other fruit ingredients derived from approximately 4.5 lbs. mixed fruit, compared with 0.52 lb. for a standardized preserve. NAD secured representative samples from the advertiser and submitted them for analysis by an independent laboratory. Results indicated there were no major differences in the fruit solids content or the individual sugars compared with a standardized preserve. NAD determined that the data supported claims that the conserves contain no refined sweeteners and are entirely derived from fruit sources. However, NAD recommended that claims for no empty calories, taking away the sugar and additives, and extra fruit content be discontinued.⁷⁶
- Magazine advertisements claimed “It’s only natural” “Caring about nutrition—a natural with Gerber,” “That’s why Gerber is the natural choice to help take the bewilderment out of feeding baby.” A competitor produced a consumer perception study demonstrating that the advertising conveyed the misleading message that Gerber baby foods are composed of all natural ingredients. The advertiser stated that the claim “It’s only natural” was intended simply to describe

⁷⁴ Healthin Corporation (Sweet Healthin Low-Calorie Sweetener), Report # 2191, *NAD Case Reports* (June 15, 1984).

⁷⁵ Mrs. Paul’s Kitchens, Inc. (Fish Sticks & Fillets), Report # 2105, *NAD Case Reports* (September 15, 1983).

⁷⁶ Allied Old English, Inc. /Sorrell Ridge Farms (Conserves), Report # 2429, *NAD Case Reports* (September 15, 1986).

a baby's "bewilderment," "delight" or "discovery" in response to an unfamiliar food choice but recognized the possibility that some consumers might understand the claim to refer to the ingredients in Gerber products. The advertiser agreed that, in future advertising, it would disclose the inclusion of chemically modified starches as ingredients in some strained and junior desserts and fruit and that it would not use a "natural" claim for any toddler foods containing a wider variety of ingredients.⁷⁷

- Magazine advertising claimed: "Stages is the only leading baby food to remove chemically modified starch from all products and replace it with more real food... The other leading brands use less than 50% real fruit...Our Stage 2 Apricots, as just one delicious example, is all natural fruit...We made room for more natural fruit by not using chemically modified starch, an artificial filler that can be hard on your baby's delicate digestive system..." A competitor questioned claims that modified starch is not a real food and that it can be hard on a baby's digestive system. NAD determined that Beech-Nut substantiated its claim that it is the only brand to entirely eliminate the use of starch fillers and that the comparative claims for extra fruit and vegetable content were accurate during the period of use. However, NAD held that the published studies the advertiser submitted to substantiate its claim that "chemically modified starch...can be hard on your baby's delicate digestive system" did not demonstrate any irritation consistent with conditions and intake levels typical of baby foods. Moreover, NAD did not agree that the data demonstrated that competing baby foods contained less "real food" or lower overall nutritive value. NAD was concerned that these claims could misrepresent the wholesomeness of widely accepted food ingredients used in competitors' products.⁷⁸
- Newspaper advertising claimed: "Mrs. Smith's Pumpkin Pie. The pick of the patch. Mrs. Smith's starts with fresh pumpkin, straight from the patch. Not canned pumpkin like other pies. That's why it's so fresh, so creamy, so tempting. Mrs. Smith's. It gives you a freshness cans can't." Carnation, packer of Libby's canned pumpkin, contended that Mrs. Smith's pies are sometimes made with frozen rather than fresh pumpkin. The advertiser stated that it purchases fresh pumpkin direct from the growers. Some of the freshly processed pumpkin is used immediately while the rest is frozen until it can be made into pies. No canned pumpkin is used since, in the advertiser's experience, it could result in excessive thermal processing. The advertiser, noting that advertising of this seasonal product is limited to the last quarter of the year, advised NAD that a decision had been made not to use the advertising at issue during the next season. Consequently, NAD did not rule on the "fresh" claim. However "fresh" claims became the subject of many reviews in the next decade.⁷⁹

⁷⁷ Gerber Products Co. (Baby Cereals, Juice, Strained, Junior, Toddler Foods), Report # 2446, *NAD Case Reports* (November 17, 1986).

⁷⁸ Beech-Nut Nutrition Corp. (Stages Baby Foods), Report # 2460, *NAD Case Reports* (January 19, 1987).

⁷⁹ Kellogg Company /Mrs. Smith's Frozen Foods Co. (Pumpkin Pie), Report # 2695, *NAD Case Reports* (May 1, 1989).

3. *The 1990's*

At the beginning of the decade, in an effort to improve the public health, Congress passed The Nutrition Labeling and Education Act (“NLEA”), a law that would substantially change the existing rules on food packaging and labeling and provide consumers with new and consistent information about the nutritional value and health benefits of the foods they purchase and eat. The FDA, the federal agency responsible for regulating the labeling of food, was given until November 1992 to implement new regulations to revise the labels found on foods. FDA’s mandate was two-fold: 1) to develop a nutrition label that would provide accurate, easy to understand nutrition information; and 2) to clearly define several terms, relating to the nutritional value or health consequences of food so that they will have a consistent and uniform meaning when used on packaging to describe the food inside. In December 1992, the FDA issued a comprehensive set of new regulations regarding food labels. The rules, in relevant part, required specific disclosures about the nutritional content of foods and developed uniform definitions for terms commonly used on packaging to describe the nutritional value of food.

The FTC and FDA have overlapping jurisdiction over the advertising and labeling of food, drugs, cosmetics and devices. Together, the two agencies have established a liaison agreement which allocates responsibilities between them. The agreement has resulted in a long-standing degree of cooperation between the agencies, each having primary jurisdiction over areas in which it has developed expertise, with the FTC assuming primary responsibility for regulating food advertising and the FDA for food labeling.⁸⁰ This agreement affirmed FDA and FTC’s commitment to work together to prevent the deception of the public, to coordinate their efforts, and to encourage consistency in handling matters of mutual concern concerning the promotion and sale of food, drugs and cosmetics in the United States.

When FDA adopted its new food label regulations in 1992, the FTC reaffirmed its commitment to work in tandem with FDA by issuing an Enforcement Policy Statement on Food Advertising which announced that as a matter of policy, FTC would seek to harmonize its advertising enforcement program with the FDA’s new food labeling

⁸⁰ 4 Trade Reg. Rep. (CCH) 9,850.01.

regulations “to the fullest extent possible” to ensure that the public receives uniform messages about the nutritional content and health consequences of the foods they eat.

NAD, as the advertising industry’s self-regulatory arm, believes that it is also important for national advertisers and the advertising industry to receive a uniform message about the standards by which their food advertising and labeling claims will be monitored and reviewed. To that end, NAD has sought to harmonize its self-regulatory efforts, in the arena of food advertising and labeling, with the framework already developed by the FDA and the FTC as illustrated by the following cases:

a. NLEA Cases

- Television commercials by Campbell’s for its new, glass jar soup claim “It’s the sound of freshness. And you hear it every time you open a jar of Campbell’s delicious new soups! Soups stocked so full with fresh carrots, fresh celery, fresh onions and firm pasta, we had to put them in glass just to show them off!” A competitor challenged the “fresh” claims as inaccurate because all of the ingredients in these soups are processed (cooked) before sale. NAD, in reviewing the “fresh” claims, looked to FDA labeling regulations which prohibit the use of the word “fresh” to describe thermally processed foods. When a federal regulatory body has provided clear direction regarding the use of a particular term on a product’s label, it will be afforded great weight by NAD when reviewing use of the same term in the product’s other advertising. NAD determined the use of the word “fresh” in the context of this commercial to be misleading because the vegetables in question were not raw, and because many reasonable consumers viewing the particular advertisement would believe that the vegetables were fresh at the time of purchase and not processed, as is the case. NAD did not, however, recommend that the term “fresh” be discontinued by the advertiser. Rather, it recommended that the claims be modified to more clearly communicate that the main feature of this line of soups is that they are prepared from or cooked with fresh vegetables. On appeal, the NARB affirmed NAD’s reasoning and conclusion.⁸¹
- Television advertising for Nabisco, Inc.’s Planters Deluxe Mixed Nuts opens with a man and a chimpanzee stranded on a desert island when a crate filled with Planters Deluxe Mixed nuts washes ashore. He sighs and says “Actually, Cootchie, we shouldn’t. We have to watch what we eat.” The chimpanzee looks at the nutrition label and begins squealing. The man reads the label and shouts “All this good stuff and no cholesterol? Cootchie to the lounge chairs.” On the bottom of the screen a small super briefly appears stating: “A cholesterol free

⁸¹ Campbell Soup Company (Campbell’s Soups In A Jar), Report # 3393, *NAD Case Reports* (July 1, 1997); NARB Panel # 96 (September 23, 1997).

food. Sixteen grams of fat per serving.” The commercial ends with a combination voice-over/super stating: “Planters. Relax. Go Nuts.” NAD noted that while undisputedly nutritious, nuts are a high fat food. NAD was concerned that consumers would interpret the prominent “cholesterol free” message to mean that they should feel free to eat as many nuts they want. Because of the significance that both the FDA and the FTC place on the need for a *clear and adequate disclosure* of total fat content, in immediate proximity to a “no cholesterol” claim” when made for a high fat food, and because the fat content disclosure in this advertisement appears in small white print at the very bottom of the screen on a non-contrasting background, NAD recommended that the advertiser make its “total fat content” disclosure substantially more clear and conspicuous.⁸²

- Television advertising by Procter & Gamble for its Olean fat substitute was challenged by the Center for Science in the Public Interest. In a series of commercials set on farms, farm workers explain that Olean is a new kind of cooking oil “Starting from crops that grow here. Like soybeans. Though I don’t like too much snacking, I do think that chips fried up in Olean are a better choice than the regular kind. It tastes real good, has a lot less fat and fewer calories.” In approving the use of olestra in snack food, FDA concluded that “GI symptoms associated with ingestion of olestra-containing foods are material fact information...Disclosing this information on food labels will enable consumers to associate olestra with any GI effects it may cause.” NAD determined that the advertiser provided a reasonable basis for its claims that chips fried in Olean are “a little healthier” or “a better choice” than regular chips, and that in the absence of any health or safety claims, did not need to make the GI disclosures required by FDA on packaging. However, because Olean is not a natural product, NAD recommended that the advertising be modified to avoid conveying a “natural” ingredient message.⁸³

*b. Infant Formula Cases*⁸⁴

The 1990’s also brought an entire new food category to direct-to-consumer marketing: infant formula. For many years, infant formula manufacturers focused their promotional efforts on physicians and hospitals, rather than new mothers. Over time, however, newcomers to the market began direct-to-consumer advertising and by the early to mid-1990’s, most of the major manufacturers had joined suit.

Sensitive to opposition from the medical community and women’s organizations, and concerned that they would be criticized for discouraging new mothers from breast-

⁸² Nabisco, Inc. (Planters Deluxe Mixed Nuts), Report # 3408, *NAD Case Reports* (August 1, 1997).

⁸³ Procter & Gamble (Olean Fat Substitute), Report # 3499, *NAD Case Reports* (October 1, 1998).

⁸⁴ A detailed article providing an overview of several recent NAD infant formula cases is attached. See David Mallen, “*Baby Steps at NAD: The Advertising of Infant Formula*,” A.B.A. CONSUMER PROTECTION UPDATE, Vol. 11(2) (SUMMER 2003).

feeding, the early advertisements emphasized the benefits of breast-feeding and suggested substitute milk products only for those women who could not, or chose not, to breast feed. Toward the end of the decade, however, the messages began to shift. While continuing to acknowledge breast milk as the “gold standard,” advertisers’ focus turned to why their particular product is more like breast milk than their competitor’s. Competitors responded by challenging these claims at NAD. Perhaps more than any other product category, NAD has had a profound impact on infant formula advertising by issuing a series of decisions that provide guidance to competitors on how to tout the proven benefits of their products and, at the same time, ensure that consumers receive truthful information about the health and nutritional benefits provided by competing infant formulas. For example:

- Magazine advertising claimed: “If your six to twelve month old baby is still drinking an infant formula, like Enfamil or Similac, try Carnation Follow-Up Formula. It means extra nutritional assurance for your baby during her second six months.” A competitor questioned Carnation’s claims of nutritional superiority over infant formulas for infants aged 6-12 months and submitted evidence to demonstrate that all infant formulas contain all essential ingredients for the first year of life and a statement from the American Academy of Pediatrics that follow-up formulas provide no clear nutritional advantage for infants receiving sufficient amounts of iron and vitamins. NAD noted that the product complies with the FDA requirements for an infant formula but contained extra protein and calcium. This was truthful information the advertiser should be free to tout. However, NAD was concerned because the advertisement made unsupported, explicit claims of nutritional superiority and implied claims of inadequacy of existing infant formulas. NAD recommended that future advertising differentiate the product on a compositional basis as providing good nutrition during the period an infant is adapting to solid foods.⁸⁵
- Print advertising for Enfamil infant formula was challenged by a competitor. The advertising claimed “...now, for the first time, Enfamil has nucleotides at levels found in breast milk.” “Nucleotides are naturally occurring in breast milk...and are integral to supporting your baby’s growth and development...No other formula comes closer to breast milk or does more for the nutrition, growth and development that are so important to your baby right now...No other formula has a fat blend closer to breast milk than Enfamil.” NAD found that the advertiser can continue to make *compositional claims* for Enfamil relating to nucleotides and fat blend, as long as the advertising (1) makes it clear that these claims are compositional claims only and (2) does not imply that Enfamil is superior to other infant formulas simply because of its compositional similarity to breast milk. NAD also recommended that, because breast milk contains free nucleotides as well as other potentially available sources of nucleotides, and Enfamil has only

⁸⁵ Carnation Company (Follow-Up Formula), Report # 2816, *NAD Case Reports* (September 1, 1990).

matched the *free* nucleotide content, the advertiser should clarify that it has matched the free nucleotides when making compositional nucleotide claims. Further, NAD recommended that the advertising be modified to eliminate any implication that dietary nucleotides are essential to a baby's growth and development.⁸⁶

In the 1990's, consumer interest in diet and health continued to grow and companies responded by increasing the nutritional information in their food advertising. This high level of activity was the catalyst for an NAD conference entitled "Substantiating Food Health Claims in Advertising." NAD brought together scientists, marketers, national advertisers, government regulators, consumer activists and members of the advertising bar to discuss the state of the science, the new regulatory structure and responsible marketing practices. Competitors used the self-regulatory forum in the 1990's to challenge each other's food related health claims and NAD continued to focus its monitoring efforts on health and weight loss claims in advertising. The following are a few representative cases:

c. Food Related Health Claims

- Commercials for Polaner All Fruit feature a saleswoman, in a supermarket, attempting (without success) to give away free samples of Smucker's preserves. The customer expresses incredulity (through comments, facial expressions, body language and tone of voice) that the saleswoman would expect anyone to accept a free jar of Smucker's preserves after she has informed them that it contains "lots of granulated sugar and corn syrup," while Polaner All Fruit is "made with fruit and fruit juice." A consumer perception study demonstrated that consumers were taking away a "healthier" and "more nutritious" message regarding the Polaner product. NAD concluded that the advertiser did not have a reasonable basis to claim, directly or by implication, that there is a nutritional benefit to fruit spreads sweetened with juice concentrates over those sweetened with granulated sugar and/or corn syrup noting that FDA's policy statement specifically provides "it is misleading to imply that a food that contains inherent sugars is nutritionally superior to a food that contains refined sugars." NAD determined that the fruit juice concentrates used to sweeten the Polaner product are the nutritional equivalents of refined sugars. Thus, the difference in sweeteners cannot serve as a reasonable basis for a disparaging comparison between these two products.⁸⁷
- Magazine advertising for Kellogg's All-Bran claimed: "Kellogg's All-Bran is an excellent source of wheat bran fiber. And a high fiber diet can help you stay regular without drugs" and "A high fiber diet and Kellogg's All-Bran for Drug-

⁸⁶ Mead Johnson & Company (Advanced Formula Enfamil®), Report # 3381, *NAD Case Reports* (April 1, 1997).

⁸⁷ International Home Foods, Inc. (Polaner All Fruit), Report # 3447, *NAD Case Reports* (March 1, 1998).

Free Regularity.” The advertisement featured a bottle of laxative pills on top and a bowl of All-Bran Cereal on the bottom. NAD was concerned that consumers may interpret this advertisement as stating that All-Bran Cereal will replace and be as effective as laxative drugs. Kellogg explained that a one-ounce serving of All-Bran provides 9 grams of fiber, which is 40 percent of the Daily Value (25 g) for fiber as defined by the FDA’s new labeling regulations and noted that the new FDA regulations define the term “excellent source” to mean 20 percent or more of the Daily Value. NAD concluded that the advertising was substantiated. Given that one serving of All-Bran Cereal (whose sole source of fiber is wheat bran) provides 40 percent of the FDA-established Daily Value for fiber, it is an “excellent source” of wheat bran fiber as defined by FDA regulations. By providing nine grams of fiber per one-ounce serving, All-Bran does, in fact, make a significant contribution to a high fiber diet. NAD found that the materials submitted supported the claim that a high fiber diet can help a person maintain regularity and concluded that the repeated mention of the word “regularity,” including the final claim, “For Drug-Free Regularity” (which appears in larger type size), should avoid any consumer interpretation that All-Bran will replace and be as effective as laxative drugs.⁸⁸

- A competitor challenged an advertising campaign by Kellogg Company for its K-Sentials™ cereals claiming: “A new fuel has arrived. The Kellogg’s cereals kids love are now enriched with K-Sentials, a special combination of vitamins and minerals so kids get more of what they need to be healthy, more of what they need to be kids. What does your cereal do for you? Kellogg’s cereals with K-Sentials have calcium for strong/stronger bones.” NAD determined that the advertiser’s evidence was insufficient to support its implied claims that K-Sentials cereals provide a unique blend of vitamins and minerals or that all K-Sentials cereals contain additional calcium. NAD recommended that these claims be modified to more accurately reflect the evidence in the record (i.e., that the nutrient blend in most K-Sentials cereals is not unique and that only certain brands of K-Sentials, the “Growth” blend, contain added calcium). However, NAD determined that the advertiser had substantiated the non-comparative or monadic “healthier” claims.⁸⁹
- A competitor challenged advertisements for Bio-Foods, Inc. Balance™ Nutrition Bars asserting that scientific evidence does not establish the efficacy of the 40/30/30 diet program or support claims that the Balance Bar is “clinically proven” to improve athletic performance, and that the product increases metabolism, promotes effective weight loss, provides better access to body fat for energy/endurance and is a complete meal replacement. NAD determined that the Balance Bar has sufficient nutritional value to provide a reasonable basis for its “meal replacement” claims. Although NAD noted that the Balance Bar and/or the 40/30/30 “zone diet” may in the future be proven to substantially benefit consumers in a variety of ways, it determined that the advertiser currently lacks sufficient testing, scientific/medical support and research to support the

⁸⁸ Kellogg Company (Kellogg’s All-Bran Cereal), Report # 3050, *NAD Case Reports* (October 1, 1993).

⁸⁹ Kellogg Company (K-Sentials Cereals), Report # 3600, *NAD Case Reports* (November 1, 1999).

challenged unqualified establishment claims, performance claims, weight loss claims and taste claims and recommended that these claims be discontinued.⁹⁰

- Broadcast, print and labeling for Smart Balance Spread and Smart Balance Oil claiming “Smart Balance is patented to improve the ratio of good to bad cholesterol” and “...an all natural oil blend that’s patented to increase or sustain good cholesterol and improve the good to bad cholesterol ratio” were challenged by a competitor. NAD determined that the advertiser’s evidence showed that the patented blend of fats that make up Smart Balance products could bring about changes in the HDL/LDL ratio only with the concomitant dietary restrictions required in its testing, i.e., limiting animal fat and dairy fats, in general, and total dietary fat to 31%; replacing at least 67% of total fat in the diet with Smart Balance; limiting cholesterol to 200-300 mg per day; avoiding or eliminating foods having hydrogenated fats and trans fatty acids; and exercising. NAD recommended that this important qualifying information be clearly and conspicuously disclosed.⁹¹

d. Weight Loss Products

- Print advertising for Dr. Metz Slimming Soles shoe inserts promised fast, safe and rather phenomenal weight loss that could be achieved “without the slightest effort” and “without dieting.” NAD determined that although the record contained some “enlightening” information on the general principles of reflexology and promising information about the potential of the effective incorporation of these principles as adjunct therapy in a carefully monitored weight loss regimen, the data was not of the quality, caliber and magnitude that would be required to substantiate these very strong, specific and quantifiable product performance claims. Based on the data submitted, NAD concluded that the literal content and presentation of the claims fundamentally overstated both the potential and the actual capabilities of the advertised product and recommended that the claims be discontinued.⁹²
- Print advertisements for Dr. Kesters Easy Trim Devices (pen-like devices that emit different odors when the cap is removed) claimed that by smelling these pens before meals or whenever hunger strikes people could achieve dramatic weight loss “A Portland Physician Reveals How He Helped A Desperate Woman to Lose 47 Pounds Without Dieting, and....how 3,193 other people melt away a total of more than 90,000 pounds [more than 40 tons] with the same incredible discovery revealed below.” The claims for the product were based on olfaction research by Dr. Alfred Hirsch, a neurologist and psychiatrist, who tested the use of “smell as an aid to weight loss” after observing that patients with a loss of smell often tended to gain weight that would be lost when smell was recovered.” NAD did not question the validity of Dr. Hirsch’s research, his statements as to the cause of obesity, hunger and satiety, or his conclusions about the usefulness of the

⁹⁰ Bio-Foods, Inc. (Balance™ Nutrition Bars), Report # 3440, *NAD Case Reports* (February 1, 1998).

⁹¹ GFA Brands, Inc., (Smart Balance Spread and Smart Balance Oil), Report # 3510, *NAD Case Reports* (January 1, 1999).

⁹² Body Well U.S.A. (Dr. Metz’ Slimming Soles), Report # 3329, *NAD Case Reports* (August 1, 1996).

inhalants he studied. However, the advertiser did not show that its product is composed of the same odorants that Dr. Hirsch considered, i.e., scents having the same molecular composition, the same intensity of odor, the same lasting characteristics, the same source, or the same delivery mechanism of the scents used in the referenced research. Moreover, NAD determined that even if they were the same, the advertising does not accurately characterize the discovery or the research. NAD concluded that the “discovery” is *not* that mere odorants alone will bring about weight loss as claimed. Rather the study showed that inhalation of “certain aromas,” i.e., the ones employed by Dr. Hirsch in his study by people with a good sense of smell could *be helpful in* connection with a nutrition and exercise program to facilitate weight reduction.⁹³

- Print advertising for ChromaTrim-100 weight loss chewing gum claimed “Speed your way to a leaner body with ChromaTrim-100 sugar-free weight loss chewing gum.”; “Its active ingredient, chromium picolinate, is clinically proven to burn body fat, decrease appetite, and increase lean muscle tissue without diet or exercise.”; “...completely safe and all-natural.” NAD requested substantiation for the health and safety claims as well as the clinical testing relied on by the advertiser to support its establishment claims. NAD determined that the advertiser provided a reasonable basis for its general claims that a supplement of chromium picolinate (50-200 micrograms), in addition to regular weight controlling activities (i.e. aerobic exercise, low fat foods, etc.), can meaningfully contribute to better physical condition and prolonged good health. However, NAD determined that the advertiser’s evidence was insufficient to support claims that the product has been “clinically proven” to burn body fat, decrease appetite and increase muscle tissue, without diet or exercise. Further, because of chromium’s role as “an insulin cofactor” and the potential for harm if a consumer consumes more than the recommended dosage, NAD recommended that the claim that ChromaTrim is “completely, extremely or 100% safe” be qualified or discontinued.⁹⁴

3. *The 21st Century*

The new Millennium has brought new challenges to NAD. Over the past four years, there has been a substantial increase in the number of direct-to-consumer prescription drug, dietary supplement and food-related nutrition advertising cases brought before NAD. In fact, challenges involving food, health and nutrition have grown to a point where they comprise the majority of NAD’s caseload. In March 2002, as part of a NARC strategic initiative called “Operation Healthy Advertising,” NAD organized and hosted a two-day conference entitled “Health Claims in Advertising: From Food to

⁹³ Widewell International Limited (Dr. Kesters EasyTrim Devices), Report # 3503, *NAD Case Reports* (October 1, 1998).

⁹⁴ Universal Merchants, Inc. (ChromaTrim-100 Weight Loss Chewing Gum), Report # 3176, *NAD Case Reports* (January 1, 1995).

Pharmaceuticals” encouraging continuing dialogue between industry, regulators and consumers to explore the legal challenges posed by the rapidly expanding arena of health claim advertising. In addition, NAD actively monitors health claims in advertising and competitors and consumer advocates continue to bring health- and nutrition-related issues to the self-regulatory forum for analysis and resolution:

a. Food Related Health Claims

- Print advertisements by the National Peanut Board were challenged by a consumer group who took issue with the advertiser’s claim that eating peanuts “May help fight heart disease” because it failed to disclose that peanuts are a calorie dense, high fat food. Noting that a quarter-cup serving of dry-roasted peanuts contains 16 grams of fat, the challenger pointed out that the FDA does not allow any health claims on labels for foods that contain more than 13 grams of fat (which is 20% of the Daily Value of 65 grams). The challenger asserted that this disqualifying level was based largely on a concern that high fat foods may contribute to increased caloric intake and obesity. Moreover, the FTC Policy Statement provides that where, as here, the risk-increasing nutrient (high fat/calories) is closely related to the health claim (heart disease prevention) the failure to disclose the amount of that nutrient in the advertisement would render the claim deceptive. In response to the challenge, the advertiser explained that the National Peanut Board is an instrumentality of the federal government that was established by order of the United States Department of Agriculture (“USDA”). Thus, all of its materials are reviewed and approved by the USDA’s Agricultural Marketing Service (AMS). NAD noted for the record that it shares the challenger’s concerns about the potential effect of food advertising on consumer health and believes that consumers need truthful and accurate information in order to make informed decisions about what to include in their diets. NAD also agreed that in the absence of clear consensus in the scientific community, when making a health claim for a food, an advertiser should disclose the level of scientific support for its claim and, when appropriate, the presence of a risk-increasing nutrient. NAD noted its appreciation for the advertiser’s voluntary commitment to more closely align its future advertising with FTC and FDA policies for food advertisements.⁹⁵
- Print advertising by Campbell Soup Company for its V8® 100% Vegetable Juice claiming “an impressive body of studies in scientific journals has shown that a diet rich in tomato products is associated with a reduced risk of certain types of cancer...For prostate cancer, a lower risk is apparent when five or more servings are consumed per week” was challenged by the Center for Science in the Public Interest. In deciding the case, NAD noted “[t]he ongoing study of the relationship between diet and disease prevention is a matter of great importance to the public, the scientific community and NAD. NAD recognizes that food labeling and

⁹⁵ National Peanut Board (Peanuts), Report # 3842, *NAD Case Reports* (November 7, 2001).

advertising play an important role in providing consumers with information about the relationship between diet and disease prevention. The challenged advertising claim for V8® informs consumers about an association between consumption of tomato products and a reduced risk of certain kinds of cancers and refers to an “impressive body of studies’ as support.” Although NAD was impressed with the quality and scope of the evidence relied upon by Campbell, NAD recommended that Campbell modify its claim that “for prostate cancer a lower risk is apparent...” to more clearly qualify the extent of scientific support for the relationship between tomato consumption and cancer prevention, given that a consensus has not yet been reached by the scientific community on the precise nature of the relationship between tomato consumption and cancer prevention.⁹⁶

Advertising claims for dietary supplements and herbal food products have also been the subject of numerous recent NAD cases. In fact, DSHEA specifically provides that advertisers can only make health and efficacy claims for dietary supplements if “the manufacturer of the dietary supplement has substantiation that such statement is truthful and not misleading.” NAD cases on dietary supplements have served to provide guidance to the industry on the legal requirements for claim substantiation. In evaluating the adequacy of the substantiation for dietary supplement claims, NAD often looks to the FTC’s guidelines for dietary supplement advertising (“Dietary Supplements: An Advertising Guide for Industry”) which requires “competent and reliable scientific evidence” as substantiation for claims regarding the efficacy of dietary supplements.

b. Dietary Supplement and Herbal Remedy Claims

- NAD inquired about the accuracy of Internet advertising for a product identified as the Skinny Pill for Kids. NAD was very concerned about claims that The Skinny Pill For Kids was “the first real help in fighting fat,” “a real solution,” “formulated with the finest ingredients, to help children reduce their risk of obesity-related diseases such as heart disease, high blood pressure and diabetes,” “offer[ing] very real weight loss help through supplements that metabolically assist children to burn more fat pounds and inches, block new fat deposits and help regulate insulin levels to help mitigate fat factors,” and “an exciting, proprietary blend of safe, natural vitamins, minerals, and fat fighting nutrients in a special blend just for children’s unique needs.” NAD had serious reservations about the safety and efficacy of a product targeted to such a unique and vulnerable population. Any claims made as to such a group would be subject to a higher level of scrutiny and would require substantiation in the form of strong clinical data that is specifically pertinent to that intended population. In light of its

⁹⁶ Campbell Soup Company (V8® 100% Vegetable Juice), Report # 3885, *NAD Case Reports* (March 7, 2002).

concerns about the sufficiency of any substantiation for the claims, NAD was pleased that the advertiser responded to its inquiry by advising NAD that it had already permanently discontinued the challenged claims. Before closing the inquiry, NAD revisited the contested website to ensure that, in fact, all references to The Skinny Pill for Kids had been deleted.⁹⁷

- Television and radio advertising for Garlique® Dietary Supplements by Chattem, Inc. claiming “A number of studies have shown that garlic can lower cholesterol by as much as 25 points. And odorless Garlique brand is the most potent garlic supplement you can buy. Use only one tablet a day. Garlique—as in unique. Garlique—cholesterol’s natural enemy” was challenged by a competitor. The advertiser argued that its advertising is clear in that the contested “establishment” claim expressly pertains to garlic, i.e., it expressly claims that “garlic [as opposed to Garlique] has been proven to lower cholesterol by as much as 25 points.” The advertiser stressed the significance of this distinction arguing that its own brand of garlic tablets need not be clinically tested because the advertising expressly references raw garlic as the subject of the testing and its product name does not appear in the context of the establishment claim. NAD, however, did not assign the same distinguishing value on the express claim (“garlic has been proven to lower cholesterol as much as 25 points”) and determined that this claim, in the context of the advertising, was an overstatement rather than a point of clarification. Without additional clarifying information, NAD found this claim to be misleading.⁹⁸
- A consumer questioned the accuracy of Vital Basics' advertising claims, that its dietary supplement product, Focus Factor, can improve brain function, such as focus, concentration and memory, and can eliminate mental fatigue. NAD concluded that Vital Basics did not produce competent and reliable evidence necessary to form a reasonable basis for its product's health benefit claims. Consequently, NAD recommended that it discontinue or significantly modify its performance claims, discontinue claims that overstate the benefits consumers can expect with the use of the product, and discontinue the use of customer testimonials not supported by competent and reliable evidence.⁹⁹
- NAD questioned the truth and accuracy of advertising for a new variety of Arizona Ice Tea claiming: “Rx Memory Mind Elixir,” “Infused with mind enhancing ginkgo biloba and panax ginseng” and “A safe and certain tonic.” NAD expressed concern that the “Rx” on the label implied that beverage provided a medicinal or health benefit. Hornell maintained that its use of the “Rx” in the product label is a mere fanciful use of the letters and does not imply that the product serves any other purpose than to provide refreshment. NAD determined that the term “Rx Memory” may be misleading to consumers because the letters “Rx” are recognized as a professional symbol used by physicians to instruct

⁹⁷ Fountain Of Youth Group, LLC (Edita’s Skinny.com/The Skinny Pill for Kids™), Report # 4021, *NAD Case Reports* (February 24, 2003).

⁹⁸ Chattem, Inc. (Garlique® Standardized Herbal Supplement), Report # 3497, *NAD Case Reports* (October 1, 1998).

⁹⁹ Vital Basics, Inc. (Focus Factor), Report # 3878, *NAD Case Reports* (February 14, 2002).

pharmacists in the formulation of specific prescriptions, a concern that has been recognized by the FTC. Additionally, the FDA has recently observed that in the case of dietary supplements, the use of the term “Rx” may deceive consumers into thinking that they are purchasing drugs without a prescription. NAD determined that consumers could reasonably understand the Rx symbol, used in this context (in combination with the “Memory Herbal Tonic” label, reference to ginkgo biloba, drawing of a scientist etc.) as a representation that consumption of the beverage will improve a person’s mind and/or memory and, in the absence of supporting evidence, recommended that the claims be discontinued.¹⁰⁰

On February 11, 2003, FTC Chair Timothy J. Muris, called on media executives to "Do the Right Thing" and stop running advertisements that contain obviously deceptive weight loss claims. Muris emphasized that while FTC efforts to combat fraudulent weight loss product advertising will continue in the future, media members also need to protect consumers. The FTC has also held workshops and meetings with industry to discuss the problems it associates with weight loss claims in advertising and has asked advertisers to aggressively self-regulate. In response, NAD has been focusing most of its current monitoring efforts on weight loss and nutrition claims in advertising. The following cases were decided in the past few months:

c. Recent Nutrition and Weight Loss Cases

- NAD inquired about the truth and accuracy of two television commercials for KFC fried chicken which implied that eating fried chicken was healthy and a good way to lose weight. In one commercial, a wife tells her husband “Hey. Remember how we’ve been talking about eating better? Well it starts today!” and plunks down a bucket of fried chicken. The voiceover states, “The secret’s out. Two Original Recipe chicken breasts have less fat than a BK Whopper. Or go skinless for just 3 grams of fat per piece. And now, get a 12-piece bucket of Kitchen-Fresh Chicken for just \$9.99. In another commercial, a man who is impressed with his friend’s weight loss asks: “Man, you look fantastic! What the heck you been doing?” He responds, “Eating chicken.” The voiceover states, “The secret’s out. One Original Recipe chicken breast has just 11 grams of carbs and packs 40 grams of protein. So if you’re watching carbs and going high protein, go KFC.” KFC submitted nutritional summaries and laboratory analysis as substantiation for the express nutritional claims made in the commercials but contended that the advertisement does not convey the implied message that fried chicken, in general, is healthy or that eating KFC fried chicken can help individuals lose weight. NAD did not agree. Given the high level of total fat, saturated fat, sodium and cholesterol in the product, NAD determined that the implied messages about the healthfulness of KFC fried chicken were not supported. NAD noted its appreciation for KFC’s decision to discontinue the

¹⁰⁰ Hornell Brewing Company (Arizona Rx Memory Mind Elixir), Report # 3736, *NAD Case Reports* (March 8, 2001).

commercials and its representation that they would not be run in future advertising.¹⁰¹

- In a television commercial for Total cereal, a woman is standing on her bathroom scale when a voice suggests she should be eating Total Cereal. When she responds that she eats Special K, the announcer remarks, "... a study of calcium supplements and reduced-calorie diets suggest you could lose more weight and burn more calories by adding more calcium to your diet plan." The woman inquires, "So?" The announcer continues, "Only Total has 100% daily value of calcium, Special K has hardly any." The woman responds "Say no more, I'll take the Total." NAD was concerned that the challenged commercial conveyed the message that simply substituting Total cereal for Special K cereal in one's reduced calorie diet, by itself, will result in more weight and fat loss. Since the study relied upon by the advertiser did not test cereal, and since women who eat Special K who are not calcium deficient will experience no benefit from the calcium in Total, NAD determined that the underlying science did not support this message. On appeal, the NARB reversed NAD's decision finding no implied superior weight loss message was conveyed by the commercial.¹⁰²
- A broadcast commercial for Stouffer's[®] Maxaroni[®] Chicken Nuggets with Mac & Cheese features a mother with her two children in a supermarket. The children plead for an unidentified food that the mother rejects disapprovingly. They then return with Maxaroni[®] Chicken Nuggets with Mac & Cheese product, which she happily agrees to buy. The voiceover states "Now there's something fun and nutritious. New Maxaroni Chicken Nuggets with Mac & Cheese." "White meat chicken and 100% real cheese." NAD determined that the advertiser substantiated its claims that Maxaroni contains white meat chicken and 100% real cheese and agreed that these ingredients provide important nutrients (protein and calcium) for children. However, NAD noted that while the advertiser highlights the positive aspects of its product (the protein and calcium provided by the white meat chicken and 100% real cheese), it fails to disclose the very high fat and sodium content of the product (22 grams of fat [8 grams of which is saturated fat and constitutes 40% of the daily value of saturated fat] and 1050 mg of sodium [or 44% of the daily value of sodium]), facts that are important in determining whether a food is a nutritious or healthy choice for children. Consequently, NAD determined that the evidence in the record is not sufficient to support the implied message that Maxaroni is a more nutritious or healthier food than competing children's foods.¹⁰³

¹⁰¹ KFC Corporation (Fried Chicken), Report # 4143, *NAD Case Reports* (February 12, 2004).

¹⁰² General Mills, Inc. (Total Cereal), Report # 4053, *NAD Case Reports* (June 16, 2003); NARB Panel # 121 (November 6, 2003).

CONCLUSION

Since the 1970's, NAD's historic record demonstrates that it has consistently met issues, including food advertising issues. Each decade, it has encountered a significant public policy issue that is reflective in advertising. Each raised new concerns and each was met successfully. During its on going work with food, health and nutrition advertising the NAD has responded to the FTC's recent call to action, in which it contended that misleading weight loss advertising is everywhere, preying on consumers desperate for an easy solution to their obesity problems. Chairman Muris said:

"We can't solve this problem alone, and regulatory powers of government should be the last, not the first, resort. Relying on private initiative brings us closer to the ideals of a free society while providing a powerful incentive to improve performance."

NAD has been heralded by the FTC as the best example of industry self-regulation in America today. NAD provides a cost-effective, non-adversarial, user-friendly forum where competitors and consumers can quickly challenge advertisements. The industry's self-regulation works and as precedent demonstrates, has been effective in the food category.

NARC trusts that this White Paper will serve several purposes. First, it will add information to the current public discussions in the food category by making clear that there is a sophisticated and respected body of standards applicable to food advertising today. Second, NARC hopes that consumers, companies and policy makers will gain a greater appreciation of the role of advertising self-regulation. NARC believes that publication of this White Paper will serve to reemphasize for all food advertisers, at a time when they are under growing scrutiny, the standards that CARU and NAD will continue to apply to all food advertising subject to self regulatory review.

¹⁰³ Nestlé USA, Inc. (Stouffer's® Maxaroni® Chicken Nuggets with Mac & Cheese), Report # 4146, *NAD Case Reports* (February 17, 2004).

**THE ADVERTISING INDUSTRY'S PROCESS OF
VOLUNTARY SELF-REGULATION**

Policies and Procedures by
**The National Advertising Review Council
(NARC)**

Administered by
**The Council of Better Business Bureaus
(CBBB)**

Effective
May 1, 2002

Procedures for:
**The National Advertising Division
(NAD)**

**The Children's Advertising Review Unit
(CARU)**

**The National Advertising Review Board
(NARB)**



NARC PARTNERS



1.1 Definitions

A. The term "national advertising" shall include any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and if the content is controlled by the advertiser.

B. The term "advertiser" shall mean any person or other legal entity that engages in "national advertising."

C. The term "advertising agency" shall mean any organization engaged in the creation and/or placement of "national advertising."

D. The term "public or non-industry member" shall mean any person who has a reputation for achievements in the public interest.

2.1 NAD/CARU

A. Function and Policies

The National Advertising Division of the Council of Better Business Bureaus (hereinafter NAD), and the Children's Advertising Review Unit (CARU), shall be responsible for receiving or initiating, evaluating, investigating, analyzing (in conjunction with outside experts, if warranted, and upon notice to the parties), and holding negotiations with an advertiser, and resolving complaints or questions from any source involving the truth or accuracy of national advertising, or consistency with CARU's Self-Regulatory Guidelines for Children's Advertising.

B. Advertising Monitoring

NAD and CARU are charged with independent responsibility for monitoring and reviewing national advertising for truthfulness, accuracy and, in the case of CARU, consistency with CARU's

C. Case Reports

The Council of Better Business Bureaus shall publish at least ten times each year the Case Reports, which will include the final case decisions of NAD, CARU and NARB, and summaries of any other matters concluded since the previous issue. Each final NAD, CARU and NARB case decision shall identify the advertiser, challenger, advertising agency, product or service, and subject matter reviewed. It shall also include a summary of each party's position, NAD, CARU or the NARB's decision and its rationale, and a concise Advertiser's Statement, if any. (See Section 2.9). CARU shall publish in the Case Reports a summary of CARU's actions, other than formal cases, during the preceding month. Included in this Activity Report, shall be the following:

- (i) Inquiries—summaries of informal inquiries under CARU's Expedited Procedures (see Section 2.12 below);
- (ii) Pre-Screening/Submissions—summaries of story-boards or videotapes of proposed advertising submitted to CARU for prescreening; and
- (iii) Commentaries—information, either news or policy, which CARU believes is appropriate to disseminate to its readership.

D. Confidentiality of NAD/CARU Proceedings

It is the policy of the National Advertising Division of the Council of Better Business Bureaus not to endorse any company, product, or service, and a decision of "Advertising Substantiated" (see Section 2.8) should not be construed as such. Correspondingly, an advertiser's voluntary modification of advertising, in cooperation with NAD/ CARU's self-regulatory efforts, is not to be construed as an admission of any impropriety. To ensure the integrity and cooperative nature of the review process, parties to NAD/CARU proceedings must agree: 1) to keep the proceedings confidential throughout the review process (See Section 2.2 (B) (vii)); and 2) not to subpoena

any witnesses or documents from NAD/CARU/NARB regarding the review proceeding in any future court or other proceeding (except for the purpose of authentication of a final, published case decision by a staff member) and to pay attorneys fees and costs if such a subpoena is attempted and successfully resisted; and, 3) after a decision has been published, not to mischaracterize any NAD/CARU/NARB case decision or use and/or disseminate any NAD/CARU/NARB case decision for any advertising and/or promotional purposes. NAD/CARU may issue a public statement, for clarification purposes, if any party violates any of the provisions of this Section.

E. Referrals to Law Enforcement Agencies

When NAD/CARU commences a review pursuant Section 2.2 of these Procedures, and the advertiser elects not to participate in the self-regulatory process, NAD/CARU shall prepare a review of the facts with relevant exhibits and, after consultation with the NARB Chair, shall forward them to the appropriate federal or state law enforcement agency. Reports of such referrals shall be included in the Case Reports.

2.2 Filing a Complaint

A. Any person or legal entity, including NAD/CARU as part of their monitoring responsibility pursuant to Section 2.1 (B) of these Procedures, may submit to NAD/CARU any complaint regarding national advertising, regardless of whether it is addressed to consumers, to professionals or to business entities. All complaints (except those submitted by consumers), including any supporting documentation, must be submitted in duplicate hard copy and in an electronic format (including evidentiary exhibits when possible.) To help ensure a timely review, challengers should strive to limit the length of their submissions to 8 double-spaced typewritten pages (excluding evidentiary exhibits) and limit the number of issues raised in a challenge to those that are the most significant. A challenger may further expedite the review of the contested advertising by waiving its right to reply (see Section 2.6 B) or by requesting an “Expedited Review” pursuant to Section 2.11 of these Proceedings.

(i) Filing Fee- All competitive challenges shall be filed together with a check, made payable to the Council of Better Business Bureaus, Inc., in the amount of \$1,500 (for CBBB members) or \$2,500 (for non-members), as a filing fee to help defray some of the administrative costs associated with the advertising review process. The President of the National Advertising Review Council (NARC) shall have the discretion to waive the fee for any challenger who can demonstrate economic hardship.

B. Upon receipt of any complaint, NAD/CARU shall promptly acknowledge receipt of the complaint and, in addition, shall take the following actions:

(i) If, at the commencement or during the course of an advertising review proceeding, NAD/CARU concludes that the advertising complained of is: (a) not national in character; (b) the subject of pending litigation or an order by a court; (c) the subject of a federal government agency consent decree or order; (d) permanently withdrawn from use prior to the date of the complaint and NAD/CARU receives the advertiser’s assurance, in writing, that the representation(s) at issue will not be used by the advertiser in any future advertising for the product or service; (e) of such technical character that NAD/CARU could not conduct a meaningful analysis of the issues; or (f) without sufficient merit to warrant the expenditure of NAD/CARU’s resources, NAD/CARU shall advise the challenger that the complaint is not, or is no longer, appropriate for formal investigation in this forum. Upon making such a determination, NAD/CARU shall advise the challenger that a case will not be opened, or in the event that an advertising review proceeding has already been commenced, shall administratively close the case file and report this action in the next issue of the Case Reports. When it can, NAD/CARU shall provide the challenger with the name and address of any agency or group with jurisdiction over the complaint.

(ii) If the complaint relates to matters other than the truth or accuracy of the advertising, or consistency with CARU's Self-Regulatory Guidelines for Children's Advertising, NAD/CARU shall so advise the challenger, as provided above, and where a significant national advertising issue is raised, shall forward a copy of the complaint to the NARC President who, in consultation with the NARB Chair, shall consider whether the complaint is appropriate for a consultive panel.

(iii) If, in its discretion, NAD determines that a complaint is too broad or includes too many issues or claims to make resolution within the time constraints proscribed by these Procedures feasible, NAD may request that the challenger limit the issues or claims to be considered in the review proceeding, or, in the alternative, advise the challenger that the matter will require an extended schedule for review.

(iv) If a complaint challenges advertising for more than one product (or product line) NAD may return the complaint to the challenger and request that separate complaints be submitted for each of the advertised products.

(v) If the complaint relates to the truth or accuracy of a national advertisement, or consistency with CARU's Self-Regulatory Guidelines for Children's Advertising, NAD/CARU shall promptly forward the complaint by facsimile, overnight, or electronic mail to the advertiser for its response.

(vi) Complaints regarding, specific language in an advertisement, or on product packaging or labels, when that language is mandated or expressly approved by federal law or regulation; political and issue advertising, and questions of taste and morality (unless raising questions under CARU's Self-Regulatory Guidelines for Children's Advertising), are not within NAD/CARU's mandate. If the complaint, in part, relates to matters other than the truth and accuracy of the advertising, or consistency with CARU's Self-Regulatory

Guidelines for Children's Advertising, NAD/ CARU shall so advise the challenger.

(vii) NAD/CARU reserves the right to refuse to open or to continue to handle a case where a party to an NAD/ CARU proceeding publicizes, or otherwise announces, to third parties not directly related to the case the fact that specific advertising will be, is being, or has been, referred to NAD/CARU for resolution. The purpose of this right of refusal is to maintain a professional, unbiased atmosphere in which NAD/CARU can affect a timely and lasting resolution to a case in the spirit of furthering voluntary self-regulation of advertising and the voluntary cooperation of the parties involved.

C. Complaints originating with NAD shall be considered only after the General Counsel of the NARB has reviewed the proposed complaint and has determined that there is a sufficient basis to proceed. This provision shall not apply to complaints originating from CARU's monitoring efforts.

D. In all cases, the identity of the challenger must be disclosed to NAD/CARU who shall advise the advertiser of the identity of the challenger.

2.3 Parties to NAD/CARU/NARB Proceedings

The parties to the proceeding are (i) NAD/CARU acting in the public interest, (ii) the advertiser acting in its own interest, and (iii) the challenger(s), whose respective rights and obligations in an NAD/CARU/NARB proceeding are defined in sections 2.2, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11, 2.12, 3.1, 3.2, 3.3, 3.5, and 4.1 of these Procedures.

2.4 Information in NAD/CARU Proceedings

A. All information submitted to NAD/CARU by the challenger and the advertiser, pursuant to Sections 2.4 through 2.11 of these Procedures, shall be submitted in duplicate hard copy and in an electronic format (including evidentiary exhibits when possible). Upon receipt of a filing by any

party, NAD/CARU shall forward a copy to the other party by messenger, facsimile, electronic or overnight mail. All transmittals by NAD/CARU during the course of an advertising review proceeding shall be paid for by the challenger, unless the challenger is a consumer or otherwise demonstrates economic hardship, in which case all transmittals shall be paid for by NAD/CARU.

B. Time periods for all submissions to NAD, CARU and NARB shall commence on and include the first day of business following the date of delivery of the triggering document and shall not include Saturdays, Sundays or Federal holidays.

C. NAD/CARU shall not consider any data submitted by a challenger that has not been made available to the advertiser, and any materials submitted by a challenger on condition that they not be shown to the advertiser shall promptly be returned. In the case of studies, tests, polls and other forms of research, the data provided should be sufficiently complete to permit expert evaluation of such study, poll, test or other research. NAD/CARU shall be the sole judge of whether the data are sufficiently complete to permit expert evaluation. If a party initially submits incomplete records of data that is then in its possession, and later seeks to supplement the record, NAD/CARU may decline to accept the additional data if it determines that the party's failure to submit complete information in the first instance was without reasonable justification.

D. An advertiser may submit trade secrets and/or proprietary information or data (excluding any consumer perception communications data regarding the advertising in question) to NAD/CARU with the request that such data not be made available to the challenger, provided it shall: (i) clearly identify those portions of the submission that it is requesting be kept confidential in the copy submitted for NAD/CARU's review; and (ii) redact any confidential portions from the duplicate copy submitted to NAD/CARU for NAD/CARU to forward to the challenger; (iii) provide a written statement setting forth the basis for the request for confidentiality; (iv) affirm that the information for which confidentiality is claimed is not publicly available and consists of trade secrets and/or proprietary information or data; and (v) attach as an exhibit to NAD/CARU's and the complainant's copy of the submission a comprehensive summary

of the proprietary information and data (including as much non-confidential information as possible about the methodology employed and the results obtained) and the principal arguments submitted by the advertiser in its rebuttal of the challenge. Failure of the advertiser to provide this information will be considered significant grounds for appeal of a decision by a challenger. (See Section 3.1)

E. Prior to the transfer of data to the advertiser or challenger, NAD/CARU shall obtain assurances that the recipients agree that the materials are provided exclusively for the purpose of furthering NAD/CARU's inquiry; circulation should be restricted to persons directly involved in the inquiry, and recipients are required to honor a request at the completion of the inquiry that all copies be returned.

2.5 The Advertiser's Substantive Written Response

The advertiser may, within 15 business days after receipt of the complaint, submit to NAD/CARU, in duplicate hard copy and an electronic format (including exhibits when possible), a written response that provides substantiation for any advertising claims or representations challenged, any objections it may have to the proceedings on jurisdictional grounds, as defined in Sections 2.2(B)(i)-(v), together with copies of all advertising, in any medium, that is related to the campaign that includes the challenged advertising. To help ensure a timely review, advertisers should strive to limit the length of their submissions to 8 double-spaced typewritten pages (excluding evidentiary exhibits). Advertiser responses addressed to the issue of NAD/CARU jurisdiction, should be submitted as soon as possible after receipt of the complaint, but in any event, must be submitted no later than 15 business days after the advertiser receives the initial complaint. (See also Section 2.10 Failure to Respond.)

2.6 The Challenger's Reply

A. If the advertiser submits a written response, NAD/CARU shall promptly forward the copy of that response prepared by the advertiser for the challenger, that shall have any material designated as confidential redacted, and shall include, as an

exhibit, a comprehensive summary of the redacted information in the manner set forth in Section 2.4 above. Within ten business days of receipt of the advertiser's response, the challenger shall submit in duplicate hard copy and an electronic format (including exhibits when possible) its reply, if any, to NAD/CARU. To help ensure a timely review, challengers should strive to limit the length of their reply to 8 double-spaced typewritten pages (excluding evidentiary exhibits). This reply should include a short Executive Summary summarizing the key points in the challenger's position on the case and cite to the supporting evidence in the record. If the challenger does not submit a reply, NAD/CARU shall proceed to decide the challenge upon the expiration of the complainant's time to reply, subject to a request by NAD/CARU for additional comments or data under Section 2.8 (A)

B. Expediting Review by Waiving the Reply –

After the challenger has reviewed the Advertiser's first substantive written response; the challenger may notify NAD in writing that it elects to waive its right to add to the record thereby expediting the proceeding. In the event that a challenger waives its right to reply, additional information from either party may be submitted only upon request from NAD and shall be treated in the same manner as requests for additional comments or data under Section 2.8(A) of these procedures and any meetings with the parties will be held at the discretion of the NAD.

2.7 Advertiser's Final Response

If the challenger submits a reply, NAD/CARU shall promptly forward a copy of that reply to the advertiser. Within ten business days after receipt of the complainant's reply, the advertiser shall submit a response, if any, in duplicate hard copy and an electronic format (including exhibits when possible). To help ensure a timely review, advertisers should strive to limit the length of their response to 8 double-spaced typewritten pages (excluding evidentiary exhibits). This response should include a short Executive Summary summarizing the key points in the advertiser's position on the case and cite to the supporting evidence in the record.

2.8 Additional Information and Meetings with the Parties

A. In the event that NAD/CARU deems it necessary and request further comments or data from an advertiser or challenger, the written response must be submitted within six business days of the request. NAD/CARU will immediately forward the additional response to the advertiser or challenger, who will be afforded six business days to submit its own response to the submission. Unless NAD/CARU requests further comments or data under this paragraph, no additional submissions will be accepted as part of the case record, and any unsolicited submissions received by NAD/CARU will be returned.

B. NAD/CARU, in its discretion, may, in addition to accepting written responses, participate in a meeting, either in person or via teleconference, with either or both parties. In the event that NAD/CARU participates in a meeting in which only one party participates, NAD/CARU shall notify the other party that a teleconference or meeting has been scheduled to take place and after the meeting shall summarize the substance of the information exchanged for the other party (or have such a summary provided by the attending party). Where feasible, upon request, an advertiser shall be afforded the opportunity to schedule its meeting with NAD/CARU after the date of challenger's meeting.

C. The period of time available for all communications, including meetings and written submissions, shall not exceed the time limits set forth in Sections 2.4 through 2.8 above except upon agreement of NAD/CARU and the parties.

2.9 Decision

A. The Final Case Decision

Within 15 business days of its receipt of the last document authorized by Rules 2.5 to 2.8, above, NAD/CARU will formulate its decision on the truth and accuracy of the claims at issue, or consistency with CARU's Self-Regulatory Guidelines for Children's Advertising; prepare the "final case decision;" provide a copy to the advertiser and invite the advertiser to add an Advertiser's Statement within five business days of receipt.

B. Advertiser's Statement

In the event that NAD/CARU decides some or all of the advertising claims at issue are not substantiated, the advertiser shall, within five business days of receipt of the decision, submit an Advertiser's Statement stating whether the advertiser agrees to modify or discontinue the advertising or chooses to take the issues to appeal, as specified in Section 3.1. The Advertiser's Statement should be concise and may not exceed one double spaced page in length. Whether an advertiser intends to comply or appeal, an advertiser may include in this statement an explanation of why it disagrees with NAD/CARU. However, this is not the venue to reargue the merits of the case, bring in new facts, or restate or summarize NAD/CARU's conclusions. NAD/CARU reserves the right, upon consultation with the advertiser, to edit for length or inappropriate material. In the event that the advertiser fails to submit an Advertiser's Statement as required by this Section, NAD/CARU may refer the matter to an appropriate government agency for review and possible law enforcement action.

C. Publication of the Decision

Upon receipt of the final version of the Advertiser's Statement, NAD/CARU shall provide copies of the "final case decision" to the advertiser and the challenger, by facsimile, electronic or overnight mail or messenger, and make the decision available to the public through press announcements and publication of the decision in the next Case Reports.

D. Case Report Headings

NAD/CARU's decisions in the Case Reports shall be published under the headings:

- Advertising Substantiated
- Advertising Referred to NARB
- Advertising Modified or Discontinued
- Administrative Closing
- Advertising Referred to Government Agency
- No Substantiation Received
- Compliance

E. Annual Summary

The first issue of the Case Reports each calendar year shall include a summary, prepared by NAD/CARU, which includes the number, source

and disposition of all complaints received and cases published by NAD/CARU during the prior year.

2.10 Failure to Respond

A. If an advertiser fails to file a substantive written response within the period provided in Section 2.5 above, NAD/ CARU shall release to the press and the public a "notice" summarizing the advertising claims challenged in the complaint, and noting the advertiser's failure to substantively respond.

B. If the advertiser fails to file a substantive written response within an additional 15 business days, NAD/CARU, may refer the file to the appropriate government agency and release information regarding the referral to the press, the public, and the media in which the advertising at issue has appeared, and shall report the referral in the next issue of the Case Reports.

C. If a challenger fails to file a reply within the time provided by Rule 2.6, or an advertiser fails to file a response within the time provided in Rule 2.7, the untimely document shall not be considered by NAD/CARU, or by any panel of the NARB.

2.11 NAD Expedited Proceeding

A challenger may, with the consent of the advertiser, request that the NAD engage in an expedited review of the contested advertising. This request must be made in the challenger's initial challenge letter to NAD, which shall not exceed four double-spaced typewritten pages. Based on the complexity of the challenge, NAD shall determine whether the matter is appropriate for an expedited review. If a challenger's request for an expedited proceeding is accepted, the challenger automatically waives its right to reply to the Advertiser's substantive written response. The advertiser will have 15 business days in which to respond to NAD's inquiry. NAD will forward the advertiser's response to the challenger. Thereafter, NAD may, in its discretion, request additional information from either party. NAD will issue a summary decision within 15 business days after the close of the evidentiary record. If NAD determines that the advertising should be modified or discontinued, the advertiser may then request a full review (with any additional submissions permitted by these Procedures) and a detailed decision. In such a case, the advertiser will be required to discontinue the

challenged advertising until the final decision is issued. In an expedited proceeding, the parties' rights to appeal (as described in Sections 3.1A and 3.1B of these Procedures) attach only in the event that the advertiser requests a full review and after a detailed decision is issued on the merits.

2.12 CARU Expedited Procedure

Notwithstanding 2.2 through 2.11 above, if the advertiser responds within five business days of receipt of an inquiry regarding non-compliance with CARU's Guidelines and the advertising is substantiated, or if within an additional five business days the advertising is modified to comply with CARU's Guidelines, no formal case will be opened, and the results will be published in the CARU Activity Report.

3.1 Appeal

A. When an advertiser does not agree to comply with NAD/CARU's decision on one or more issues involved in a case, the advertiser shall be entitled to panel review by the NARB. To appeal an NAD/CARU decision, an advertiser shall make a request for a referral to the NARB and specify any and all issues for its appeal in the Advertiser's Statement it prepares in response to NAD/CARU's decision pursuant to Section 2.8(A). All advertiser requests for an appeal to NARB shall be submitted together with a check made payable to the Council of Better Business Bureaus, Inc. in the amount of \$500 (for CBBB Members) or \$1000 (for non-members). In such cases, NAD/CARU shall publish its decision and the Advertiser's Statement in the next Case Reports, under the heading "Advertising Referred to NARB".

B. Within ten business days after the date of receipt of a copy of NAD/CARU's final case decision, the challenger may request review by the NARB by filing a letter, not to exceed 20 double spaced pages plus any relevant attachments from the NAD/CARU case record, explaining its reasons for seeking review. The letter should be addressed to the Chair, NARB, Attention: Executive Director, 70 West 36th Street, 13th Floor, New York, NY 10018. All Challenger request for permission to appeal shall be filed together with a check made payable to the Council of Better Business Bureaus, Inc. in the amount of \$500. The challenger shall send a copy of this letter to the advertiser and to NAD/CARU.

Within ten business days after receipt of the copy of the request for review, the advertiser may and NAD/CARU shall submit a response to the NARB Chair, not to exceed 20 double spaced pages plus any relevant attachments from the NAD/CARU case record. A copy of the advertiser's and NAD/CARU's responses shall be sent by the advertiser and NAD/CARU, respectively, to the other parties, except that portions of the case record that were submitted to NAD/CARU on a confidential basis shall not be sent to the challenger unless the advertiser consents. No other submissions shall be made to the NARB Chair. These letters, together with the relevant sections of the case record provided by the parties, will be reviewed by the NARB Chair, who within ten business days after the time for the last submission under this rule has expired shall (1) determine if there is no substantial likelihood that a panel would reach a decision different from NAD/ CARU's decision; or (2) proceed to appoint a review panel as outlined in Section 3.2. The NARB Chair shall return the record to NAD/CARU after (s)he makes his or her determination. With the exception of the time period within which a challenger must file a request for NARB review of an NAD/CARU decision, the NARB Chair reserves the right to extend the time intervals provided in this Section for good cause, notifying all interested parties of such extension.

C. When an advertiser appeals to the NARB pursuant to Section 3.1(A), or if the NARB Chair grants a complainant's request for NARB review pursuant to Section 3.1(B), the appellant shall pay a filing fee by check made payable to the Council of Better Business Bureaus, Inc. in the amount of \$500 (for a CBBB member) or \$1000 (for a non-member). NAD/CARU shall prepare the relevant portions of the case record and forward them to the NARB within five business days. The NARB shall thereafter make copies of and mail the case record to the parties, except that portions of the case record that were submitted to NAD/CARU on a confidential basis shall not be sent to the challenger unless the advertiser consents. The appellant shall pay for all NARB copying and transmittal costs incurred as a result of an appeal or request for appeal, pursuant to Sections 3.1 through 3.6 of these Procedures. Where the advertiser and the challenger both appeal, these costs shall be divided equally between them. In any event, NARB shall pay these costs for any party that can demonstrate

economic hardship. The party appealing shall, within ten business days of receipt of the case record prepared by NAD/CARU, submit to the NARB Chair, addressed as indicated in Section 3.1(B), a letter not to exceed 30 double spaced pages explaining its position. The appellant shall send a copy of the letter to the other parties, who shall each have ten business days of receipt of which to submit a response, not to exceed 30 double spaced pages, to the NARB Chair, with copies to the other parties. No other submissions shall be made.

D. In the event that the advertiser shall exercise its right to an appeal under Section 3.1(A), the challenger shall have the right to appeal any additional issues considered by the NAD/CARU that have not been appealed by the advertiser. In the event that a challenger's request to appeal is granted by the NARB Chair under Section 3.1(B), the advertiser may appeal any additional issues considered by the NAD/CARU that have not been appealed by the challenger, notwithstanding that its time to file an appeal as of right has expired. The challenger or advertiser may exercise the right to appeal under this paragraph by submitting a letter to the NARB at the address listed in Section 3.1(B), requesting the appeal and specifying the additional issues it wishes to appeal. In the case of the challenger, the letter shall be due within five business days of receipt of the final case decision with the advertiser's statement indicating the advertiser's election to appeal; in the case of the advertiser, the letter is due within five business days of the date of receipt of the NARB Chair's determination granting the challenger's request to appeal. Copies of these letters shall be sent by the issuing party to all of the other parties. The advertiser shall be deemed thereafter to be the appellant for purposes of the order of submissions.

3.2 Appointment of Review Panel

The Chair, upon receipt of an appeal by an advertiser, or upon granting a request to appeal by a challenger, shall appoint a panel of qualified NARB members and designate the panel member who will serve as panel Chair.

3.3 Eligibility of Panelists

An "advertiser" NARB member will be considered as not qualified to sit on a particular panel if his/her

employing company manufactures or sells a product or service which directly competes with a product or service sold by the advertiser involved in the proceeding. An "agency" NARB member will be considered as not qualified if his/her employing advertising agency represents a client which sells a product or service which directly competes with the product or service involved in the proceeding. A NARB member, including a non-industry member, shall disqualify himself/herself if for any reason arising out of past or present employment or affiliation (s)he believes that (s)he cannot reach a completely unbiased decision. In addition, the Executive Director shall inform the advertiser, challenger, and the Director of NAD/CARU of their right to object, for cause, to the inclusion of individual panel members, and to request that replacement members be appointed. Requests will be subject to approval by the NARB Chair. If the NARB Chair is unable to appoint a qualified panel, (s)he shall complete the panel by appointing one or more alternate NARB member(s).

3.4 Composition of Review Panel

Each panel shall be composed of one "public" member, one "advertising agency" member, and three "advertiser" members. Alternates may be used where required. The panel will meet at the call of its chair, who will preside over its meetings, hearings and deliberations. A majority of the panel will constitute a quorum, but the concurring vote of three members is required to decide any substantive question before the panel. Any panel member may write a separate concurring or dissenting opinion, which will be published with the majority opinion.

3.5 Procedure of Review Panel

A. As soon as the panel has been selected, the Executive Director will inform all parties as to the identity of the panel members. At the same time, (s)he will mail copies of all submissions under Section 3.1(C) to each of the panel members, and will, in like manner, send them any response or request submitted by any other party or parties. Within ten days after receiving copies of the appeal, the panel members shall confer and fix the time schedule that they will follow in resolving the matter.

B. The panel, under the direction of its chair, should proceed with informality and speed. If any party to

the dispute before NAD/CARU requests an opportunity to participate in the proceedings before the panel, (s)he shall be accommodated. All parties to a matter before the panel shall be given ten days notice of any meeting at which the matter is to be presented to the panel. Such notice shall set out the date and place of the meeting, and the procedure to be followed.

C. The case record in NAD, CARU and/or NARB proceedings shall be considered closed upon the publication of the “final case decision” as described in Section 2.8. No factual evidence, arguments or issues will be considered within the case record if they are introduced after that date.

D. The decision of the panel will be based upon the portion of the record before NAD/CARU which it has forwarded to the panel, the submissions under Section 3.1 (C), and any summaries of the record facts and arguments based thereon which are presented to the panel during its meeting with the parties. A party may present representatives to summarize facts and arguments that were presented to NAD/CARU, and members of the panel may question these persons. If the advertiser has declined to share any of its substantiation with the challenger, the panel will honor its request for confidentiality, even though the challenger may have instituted the appeal. The challenger will therefore be excluded from the meeting during the time when such confidential substantiation is being discussed by the panel with NAD/CARU and the advertiser. The panel will consider no facts or arguments if they are outside the facts presented to, or inconsistent with the arguments made before, NAD/CARU. However, in the event that newly discovered, significant evidence germane to the issues to be decided by the panel becomes available, the panel may remand the case back to NAD/CARU for its further consideration and decision.

3.6 Timing and Reporting of Panel Decisions

When the panel has reached a decision, it shall notify the NARB Chair of its decision and the rationale behind it in writing and shall endeavor to do so within 15 business days. The Chair, upon receipt of a panel’s decision, shall transmit such decision and rationale to NAD/CARU and then to the advertiser. The advertiser then has five business days to respond indicating its acceptance, rejection

or any comments it may wish to make on the panel’s decision and shall state whether or not it will comply with the panel’s decision. Thereafter, the Chair shall notify other parties to the case of the panel’s decision, incorporating therein the response from the advertiser, and make such report public. In the event that a panel has determined that an advertising claim has not been substantiated or is untruthful and/ or inaccurate, and the advertiser fails to indicate that the specific advertisement(s) will be either withdrawn or modified in accordance with the panel’s findings within a time period appropriate to the circumstances of the case, the Chair will issue a Notice of Intent to the advertiser that the full record on the case will be referred to the appropriate government agency. If the advertiser fails to respond or does not agree in writing to comply with the decision of the panel within ten days of the issuance of the Notice of Intent, the Chair shall so inform the appropriate government agency by letter, shall offer the complete NARB file upon request to such government agency, and shall publicly release his/her letter. The Chair and/or Executive Director of the NARB shall report to the NARB at its annual meeting on, among other things, the number, source and disposition of all appeals received by the NARB.

3.7 Closing a Case

When a case has been concluded with the publication of a NAD/CARU decision or, when a panel has turned over a decision to the Chair, and when the Chair has executed the procedures in Section 3.6 of these “Procedures,” the case will be closed and, absent extraordinary circumstances, no further materially similar complaints on the claim(s) in question shall be accepted by NAD/CARU or NARB, except as provided for in Section 4.1.

3.8 Confidentiality of Panel Procedures

All panels, through the Executive Director, shall maintain a record of their proceedings, but a verbatim record is not required. All deliberations, meetings, proceedings and writings of a panel other than the written statement of its conclusions and the rationales behind them shall be confidential, with the sole exception of those which the Chair of the NARB determines must be made available to an agency of the government. A published NAD/CARU decision and an NARB Panel Report,

in those cases referred to a panel, are the only permanent records required to be kept as to the basis of an inquiry, the issues defined, the facts and data presented, and the conclusions reached by NAD/ CARU and a NARB Panel, if one has been involved in the process.

4.1 Compliance

A. After an NAD, CARU or NARB panel decision requesting that advertising be “Modified or Discontinued” is published, together with an Advertiser’s Statement indicating the advertiser’s willingness to comply with NAD, CARU or the NARB panel’s recommendations, or an advertiser agrees to modify or discontinue advertising pursuant to §2.12 CARU Expedited Procedure, NAD/CARU, either on its own or at the behest of a challenger or a third party, may request that the advertiser report back on the status of the advertising at issue and explain the steps it has taken to bring the advertising into compliance with the decision. Any evidence that NAD/CARU relies on as a basis for its request for a report on compliance shall be forwarded to the advertiser together with the request for a status report.

B. If, after reviewing the advertiser’s response to a request for a status report on compliance, pursuant to Section 4.1, or, if the advertiser fails to respond, after NAD/CARU independently reviews the current advertising, NAD/ CARU determines that the advertiser, after a reasonable amount of time, has not made a bona fide attempt to bring its advertising into compliance with NAD, CARU or the NARB panel’s recommendations and/or the representations with respect to compliance made in its Advertiser’s Statement, NAD/CARU may refer the file to the appropriate government agency and release information regarding the referral to the press, the public, and to the media in which the advertising at issue has appeared, and shall report the referral in the next issue of the *Case Reports*. The amount of time considered reasonable will vary depending on the advertising medium involved.

C. If NAD/CARU determines that the advertiser has made a reasonable attempt to comply with an NAD, CARU or NARB panel decision, but remains concerned about the truthfulness and accuracy of the advertising, as modified, NAD/CARU will notify the advertiser, in writing, detailing these concerns. The advertiser will have ten business days

after receipt of NAD/CARU’s notice to respond, unless NAD/CARU expressly agrees to extend the advertiser’s time to answer. Within 15 days of receipt of the advertiser’s response, NAD/CARU will make a determination regarding the advertiser’s compliance, and:

(i) if NAD/CARU concludes that the advertising is in compliance with NAD, CARU or the NARB panel’s decision, NAD/CARU will notify the advertiser and close the compliance inquiry;

(ii) if NAD/CARU recommends that further modifications be made, to bring the advertisement into compliance with NAD, CARU or the NARB panel’s original decision, NAD/CARU will notify the advertiser of its findings and any further recommendations for compliance.

(a) If the advertiser accepts NAD/CARU’s compliance findings, and agrees to discontinue the advertising at issue until it makes the further modifications recommended by NAD/CARU, NAD/CARU shall report this in the next issue of the Case Reports and shall continue to monitor for compliance.

(b) If the advertiser indicates that it disagrees with NAD/CARU’s compliance findings and refuses to make the further modifications recommended by NAD/CARU, the advertiser may, within five business days of receiving NAD/CARU’s letter, submit a statement documenting its disagreement. Upon receipt of such statement, or in the event an advertiser fails to respond within five days, NAD/CARU:

(1) shall, where compliance with an NARB panel decision is at issue, refer the matter to the NARB Chair for review under Section 3.6 above; and

(2) may, where compliance with an NAD/CARU decision is at issue, refer the matter to the appropriate government agency and report this action to the press, the public, and any medium in which the advertising at issue appeared; and shall report its findings in the next issue of NAD Case Report.

GENERAL PROVISIONS

5.1 Amendment of Standards

Any proposals to amend any advertising standards which may be adopted by NARB may be acted on by a majority vote of the entire membership of the NARB at any special or regular meeting, or by written ballot distributed through the United States mails, provided that the text of the proposed amendment shall have been given to the members 30 days in advance of the voting date. Once NARB voting is completed and tallied, the NARC President shall take it to the NARC Board of Directors for their approval.

5.2 Use of Consultive Panels for Matters Other Than Truth and Accuracy, or Consistency with CARU's Self-Regulatory Guidelines for Children's Advertising

From time to time, NARB may be asked to consider the content of advertising messages in controversy for reasons other than truth and accuracy, or consistency with CARU's Self-Regulatory Guidelines for Children's Advertising, or the NARC or the NARB may conclude that a question as to social issues relative to advertising should be studied. In such cases the following procedures shall be employed to deal with such issues:

5.3 Consultive Panels

The NARB Chair may consult regularly with the NARC President, the NARC Board of Directors or with the NARB to determine whether any complaints have been received, or any questions as to the social role and responsibility of advertising have been identified, which should be studied and possibly acted upon. If so, a consultive panel of five NARB members shall be appointed, in the same proportions as specified for adjudicatory panels in Section 3.4 above..

5.4 Panel Procedures

Consultive panels shall review all matters referred to them by the Chair and may consult other sources to develop data to assist in the evaluation of the broad questions under consideration. No formal inquiry should be directed at individual advertisers.

5.5 Confidentiality

All panel investigations, consultations and inquiries shall be conducted in complete confidence.

5.6 Position Paper

If a consultive panel concludes that a position paper should be prepared to summarize its findings and conclusions for presentation to the full NARB, the paper shall be written by one or more members of the panel, or by someone else under its direction. The contents of the paper should reflect the thinking of the entire panel, if possible, but any panel member may write a separate concurring or dissenting opinion, which will be published with the panel report, if it is published.

5.7 Voting on Publication

Any such report prepared by a consultive panel will be submitted to the NARB Chair, who will distribute copies to the full NARB for its consideration and possible action. The members of the NARB will be given three weeks from the date of such distribution within which to vote whether to publish the report or not. Their votes will be returned to the Executive Director of the NARB. If a majority of the NARB members vote for its publication the report will be distributed to NARC for its review and will be published only if a majority of NARC vote for its publication.

5.8 Publication

If a majority of the NARB and NARC vote for publication, the paper will be published promptly with appropriate publicity.

Self-Regulatory Guidelines for Children's Advertising

Children's Advertising Review Unit
Council of Better Business Bureaus, Inc.
70 West 36th Street, New York, NY 10018

The Children's Advertising Review Unit Self-Regulatory Guidelines for Children's Advertising

The Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus was established in 1974 by the National Advertising Review Council (NARC) to promote responsible children's advertising and to respond to public concerns. The NARC is a strategic alliance of the advertising industry and the Council of Better Business Bureaus (CBBB). The NARC's Board of Directors comprises key executives from the CBBB, the American Association of Advertising Agencies (AAAA), the American Advertising Federation (AAF) and the Association of National Advertisers (ANA). The NARC Board sets policy for CARU's self-regulatory program, which is administered by the CBBB and is funded directly by members of the children's advertising industry.

CARU's Advisory Board, composed of leading experts in education, communication and child development as well as prominent industry leaders, advise on general issues concerning children's advertising and assist in revisions of the Guidelines.

CARU's basic activities are the review and evaluation of child-directed advertising in all media, and online privacy practices as they affect children. When these are found to be misleading, inaccurate or inconsistent with the Guidelines, CARU seeks changes through the voluntary cooperation of advertisers and Website operators.

CARU provides a general advisory service for advertisers and agencies and also is a source of informational material for children, parents and educators. CARU encourages advertisers to develop and promote the dissemination of educational messages to children consistent with the Children's Television Act of 1990.

Principles

Seven basic Principles underlie CARU's Guidelines for advertising directed to children under 12:

1. Advertisers should always take into account the level of knowledge, sophistication and maturity of the audience to which their message is primarily directed. Younger children have a limited capacity for evaluating the credibility of information they receive. They also may lack the ability to understand the nature of the personal information they disclose on the Internet. Advertisers, therefore, have a special responsibility to protect children from their own susceptibilities.
2. Realizing that children are imaginative and that make-believe play constitutes an important part of the growing up process, advertisers should exercise care not to exploit unfairly the imaginative quality of children. Unreasonable expectations of product quality or performance should not be stimulated either directly or indirectly by advertising.

3. Products and content which are inappropriate for children should not be advertised or promoted directly to children.
4. Recognizing that advertising may play an important part in educating the child, advertisers should communicate information in a truthful and accurate manner and in language understandable to young children with full recognition that the child may learn practices from advertising which can affect his or her health and well-being.
5. Advertisers are urged to capitalize on the potential of advertising to influence behavior by developing advertising that, wherever possible, addresses itself to positive and beneficial social behavior, such as friendship, kindness, honesty, justice, generosity and respect for others.
6. Care should be taken to incorporate minority and other groups in advertisements in order to present positive and pro-social roles and role models wherever possible. Social stereotyping and appeals to prejudice should be avoided.
7. Although many influences affect a child's personal and social development, it remains the prime responsibility of the parents to provide guidance for children. Advertisers should contribute to this parent-child relationship in a constructive manner.

These Principles embody the philosophy upon which CARU's mandate is based. The Principles, and not the Guidelines themselves, determine the scope of our review. The Guidelines effectively anticipate and address many of the areas requiring scrutiny in child-directed advertising, but they are illustrative rather than limiting. Where no specific Guideline addresses the issues of concern to CARU, it is these broader Principles that CARU applies in evaluating advertising directed to the uniquely impressionable and vulnerable child audience.

Interpretation of the Guidelines

Because children are in the process of developing their knowledge of the physical and social world they are more limited than adults in the experience and skills required to evaluate advertising and to make purchase decisions. For these reasons, certain presentations and techniques which may be appropriate for adult-directed advertising may mislead children if used in child-directed advertising.

The function of the Guidelines is to delineate those areas that need particular attention to help avoid deceptive advertising messages to children. The intent is to help advertisers deal sensitively and honestly with children and is not meant to deprive them, or children, of the benefits of innovative advertising approaches.

The Guidelines have been kept general in the belief that responsible advertising comes in many forms and that diversity should be encouraged. The goal in all cases should be to fulfill the spirit as well as the letter of the Guidelines and of the Principles on which they are based.

Scope of the Guidelines

The Guidelines apply to advertising addressed to children under twelve years of age in all media, including print, broadcast and cable television, radio, video, point-of-sale and online advertising and

packaging. CARU interprets this as including fundraising activities and sponsor identifications on non-commercial television and radio. One section applies to adult-directed advertising only when a potential child-safety concern exists (see Safety, below). Another section addresses children's online privacy (see Interactive Electronic Media).

Product Presentations and Claims

Children look at, listen to and remember many different elements in advertising. Therefore, advertisers need to examine the total advertising message to be certain that the net communication will not mislead or misinform children.

1. Copy, sound and visual presentations should not mislead children about product or performance characteristics. Such characteristics may include, but are not limited to, size, speed, method of operation, color, sound, durability and nutritional benefits.
2. The advertising presentation should not mislead children about benefits from use of the product. Such benefits may include, but are not limited to, the acquisition of strength, status, popularity, growth, proficiency and intelligence.
3. Care should be taken not to exploit a child's imagination. Fantasy, including animation, is appropriate for younger as well as older children. However, it should not create unattainable performance expectations nor exploit the younger child's difficulty in distinguishing between the real and the fanciful.
4. The performance and use of a product should be demonstrated in a way that can be duplicated by the child for whom the product is intended.
5. Products should be shown used in safe ways, in safe environments and in safe situations.
6. What is included and excluded in the initial purchase should be clearly established.
7. The amount of product featured should be within reasonable levels for the situation depicted.
8. Representation of food products should be made so as to encourage sound use of the product with a view toward healthy development of the child and development of good nutritional practices.
9. Advertisements representing mealtime should clearly and adequately depict the role of the product within the framework of a balanced diet.
10. Snack foods should be clearly represented as such, and not as substitutes for meals.
11. In advertising videos, films and interactive software, advertisers should take care that only those which are age-appropriate are advertised to children. If an industry rating system is available, the rating label should be prominently displayed. Inconsistencies will be brought to the attention of the rating entity.

12. Portrayals or encouragement of behavior inappropriate for children (e.g.: violence or sexuality) and presentations that could frighten or provoke anxiety in children should be avoided

13. If objective claims are made in an advertisement directed to children, the advertiser should be able to supply adequate substantiation.

Sales Pressure

Children are not as prepared as adults to make judicious, independent purchase decisions. Therefore, advertisers should avoid using extreme sales pressure in advertising presentations to children.

1. Children should not be urged to ask parents or others to buy products. Advertisements should not suggest that a parent or adult who purchases a product or service for a child is better, more intelligent or more generous than one who does not. Advertising directed toward children should not create a sense of urgency or exclusivity, for example, by using words like "now" and "only".

2. Benefits attributed to the product or service should be inherent in its use. Advertisements should not convey the impression that possession of a product will result in more acceptance of a child by his or her peers. Conversely, it should not be implied that lack of a product will cause a child to be less accepted by his or her peers. Advertisements should not imply that purchase and use of a product will confer upon the user the prestige, skills or other special qualities of characters appearing in advertising.

3. All price representations should be clearly and concisely set forth. Price minimizations such as "only" or "just" should not be used.

Disclosures and Disclaimers

Children have a more limited vocabulary and less developed language skills than do adolescents and adults. They read less well, if at all, and rely more on information presented pictorially than verbally. Simplified wording, such as "You have to put it together" instead of "Assembly required," significantly increases comprehension.

1. All disclosures and disclaimers that are material to a child should be in language understandable by the child audience, legible and prominent. When technology permits, both audio and video disclosures are encouraged, as is the use of demonstrative disclosures.

2. Advertising for unassembled products should clearly indicate that they need to be put together to be used properly.

3. If any item essential to use of the product, such as batteries, is not included, this fact should be disclosed clearly.

4. Information about products purchased separately, such as accessories or individual items in a collection, should be disclosed clearly.

5. If television advertising to children involves the use of a toll-free telephone number, it must be clearly stated, in both audio and video disclosures, that the child must get an adult's permission to call.

- a. In print or online advertising, this disclosure must be clearly and prominently displayed.
 - b. In radio advertising, the audio disclosure must be clearly audible.
6. If an advertiser creates or sponsors an area in cyberspace, either through an online service or a Website, the name of the sponsoring company and/or brand should be prominently featured, (including, but not limited to wording such as "The ... Playground", or "Sponsored by ...").
 7. If videotapes, CD-ROMs, DVDs or software marketed to children contain advertising or promotions (e.g. trailers) this fact should be clearly disclosed on the packaging, and the advertising itself should be separated from the program and clearly designated as advertising.

Comparative Claims

Advertising which compares the advertised product to another product may be difficult for young children to understand and evaluate. Comparative claims should be based on real product advantages that are understandable to the child audience.

1. Comparative advertising should provide factual information. Comparisons should not falsely represent other products or previous versions of the same product.
2. Comparative claims should be presented in ways that children understand clearly.
3. Comparative claims should be supported by appropriate and adequate substantiation.

Endorsement and Promotion by Program or Editorial Characters

Studies have shown that the mere appearance of a character with a product can significantly alter a child's perception of the product. Advertising presentations by program/editorial characters may hamper a young child's ability to distinguish between program/editorial content and advertising.

1. All personal endorsements should reflect the actual experiences and beliefs of the endorser. Celebrities and real-life authority figures may be used as product endorsers, presenters, or testifiers. However, extra care should be taken to avoid creating any false impression that the use of the product enhanced the celebrity's performance.
2. An endorser represented, either directly or indirectly, as an expert must possess qualifications appropriate to the particular expertise depicted in the endorsement.
3. Program personalities, live or animated, should not be used to sell products, premiums or services in or adjacent to programs primarily directed to children in which the same personality or character appears.
4. Products derived from or associated with program content primarily directed to children should not be advertised during or adjacent to that program.

5. In print media primarily designed for children, a character or personality associated with the editorial content of a publication should not be used to sell products, premiums or services in the same publication.

6. For print and interactive electronic media in which a product, service, or product/service-personality is featured in the editorial content (e.g., character-driven magazines or Websites, product-driven magazines or Websites, and club newsletters) guideline 4 does not specifically apply. In these instances advertising content should nonetheless be clearly identified as such.

Premiums, Promotions and Sweepstakes

The use of premiums, promotions and sweepstakes in advertising has the potential to enhance the appeal of a product to a child. Therefore, special attention should be paid to the advertising of these marketing techniques to guard against exploiting children's immaturity.

Premiums

1. Children have difficulty distinguishing product from premium. If product advertising contains a premium message, care should be taken that the child's attention is focused primarily on the product. The premium message should be clearly secondary.

2. Conditions of a premium offer should be stated simply and clearly. "Mandatory" statements and disclosures should be stated in terms that can be understood by the child audience.

Kids' Clubs

In advertising to children, care should be taken not to mislead them into thinking they are joining a club when they are merely making a purchase or receiving a premium. Before an advertiser uses the word "club", certain minimum requirements should be met. These are:

1. Interactivity - The child should perform some act constituting an intentional joining of the club, and receive something in return. Merely watching a television program or eating in a particular restaurant, for example, does not constitute membership in a club.

2. Continuity - There should be an ongoing relationship between the club and the child member, for example, in the form of newsletter or activities, at regular intervals.

3. Exclusivity - The activities or benefits derived from membership in the club should be exclusive to its members, and not merely the result of purchasing a particular product.

Please see the Data Collection section of the Guidelines for Interactive Electronic Media for special considerations when fulfilling these requirements in the interactive media.

Sweepstakes and Contests

In advertising sweepstakes to children, care should be taken not to produce unrealistic expectations of the chances of winning, or inflated expectations of the prize(s) to be won. Therefore:

1. The prize(s) should be clearly depicted.
2. The likelihood of winning should be clearly disclosed in language clearly understandable to the child audience (for instance, where appropriate, “Many will enter, a few will win”). In appropriate media, disclosures must be included in the audio portion.
3. All prizes should be appropriate to the child audience.
4. Alternate means of entry should be disclosed.
5. Online contests or sweepstakes should not require the child to provide more information than is reasonably necessary. Any information collection must meet the requirements of the Data Collection section of the Guidelines and the federal Children’s Online Privacy Protection Act (COPPA). [For examples of compliant information collection practices for this purpose, please visit <http://www.caru.org/news/commentary.asp>].

Safety

Imitation, exploration and experimentation are important activities to children. They are attracted to commercials in general and may imitate product demonstrations and other actions without regard to risk. Many childhood accidents and injuries occur in the home, often involving abuse or misuse of common household products.

1. Products inappropriate for use by children should not be advertised directly to children. This is especially true for products labeled, "Keep out of the reach of children." Such inappropriate products or promotions include displaying or knowingly linking to the URL of a Website not in compliance with CARU’s Guidelines. Additionally, such products should not be promoted directly to children by premiums or other means. Medications, drugs and supplemental vitamins should not be advertised to children.
2. Advertisements for children's products should show them being used by children in the appropriate age range. For instance, young children should not be shown playing with toys safe only for older children.
3. Adults should be shown supervising children when products or activities could involve a safety risk.
4. Advertisements should not portray adults or children in unsafe situations, or in acts harmful to themselves or others. For example, when athletic activities (such as bicycle riding or skateboarding) are shown, proper precautions and safety equipment should be depicted.
5. Advertisements should avoid demonstrations that encourage dangerous or inappropriate use or misuse of the product. This is particularly important when the demonstration can be easily reproduced by children and features products accessible to them.

Interactive Electronic Media

The guidelines contained in this section highlight issues unique to Internet and online advertising to children under 13. They are to be read within the broader context of the overall Guidelines, which apply to advertising in all media. For these purposes, the term “advertisers” also refers to any person who operates a commercial Website located on the Internet or an online service. Although all other sections of CARU's Self-Regulatory Guidelines for Children's Advertising address advertising directed to children under 12 years of age, in order to harmonize with the Federal Trade Commission's ("FTC") final rule implementing the Children's Online Privacy Protection Act of 1998 ("the Rule"), the guidelines contained in the section on Data Collection below apply to Websites directed to children under 13 years of age.

Just as these new media are rapidly evolving, so in all likelihood will this section of the Guidelines. Advances in technology, increased understanding of children's use of the medium, and the means by which these current guidelines are implemented will all contribute to the evolution of the "Interactive Electronic Media" section. CARU's aim is that the Guidelines will always support "notice", "choice" and "consent" as defined by the FTC, and reflect the latest developments in technology and its application to children's advertising.

Further, these children's Guidelines must be overlaid on the broader, and still developing industry standards, government statutory provisions and definitions for protecting and respecting privacy preferences. These industry standards include disclosure of what information is being collected and its intended uses, and the opportunity for the consumer to withhold consent for its collection for marketing purposes. Thus, in the case of Websites directed to children or children's portions of general audience sites that collect personal information from children, reasonable efforts, taking into consideration available technology, should be made to establish that notice is offered to, and choice exercised by a parent or guardian.

The availability of hyperlinks between sites can allow a child to move seamlessly from one to another. However there is no way to predict where the use of successive links on successive pages will lead. Therefore, operators of Websites for children or children's portions of general audience sites should not knowingly link to pages of other sites that do not comply with CARU's Guidelines.

In keeping with CARU's Principle regarding respecting and fostering the parents' role in providing guidance for their children, advertisers who communicate with children through email should remind and encourage parents to check and monitor their children's use of email and other online activities regularly.

To respect the privacy of parents, information collected and used for the sole purpose of obtaining verifiable parental consent or providing notice should not be maintained in retrievable form by the site if parental consent is not obtained after a reasonable time.

The following guidelines apply to online activities which are intentionally targeted to children under 13, or where the Website knows the visitor is a child. In Websites where there is a reasonable expectation that a significant number of children will be visiting, age-screening mechanisms should be employed to determine whether verifiable parental consent or notice and opt-out is necessitated per the

Data Collection section of the Guidelines. These mechanisms should be used in conjunction with technology to help prevent an underage child from going back and changing his age to circumvent the age-screening. Care should be taken so that screening questions are asked in a neutral manner so as not to encourage children to provide inaccurate information to avoid obtaining parental permission. For purposes of this section, these activities include making a sale or collecting data, and do not include the use of "spokescharacters" or branded environments for informational or entertainment purposes, which are addressed in the "Endorsement" and "Disclosure" sections of the Guidelines.

Making a Sale

Advertisers who transact sales with children online should make reasonable efforts in light of all available technologies to provide the person responsible for the costs of the transaction with the means to exercise control over the transaction. If there is no reasonable means provided to avoid unauthorized purchases of goods and services by children, the advertiser should enable the person responsible to cancel the order and receive full credit without incurring any charges. Advertisers should keep in mind that under existing state laws, parents may not be obligated to fulfill sales contracts entered into by their young children.

1. Children should always be told when they are being targeted for a sale.
2. If a site offers the opportunity to order or purchase any product or service, either through the use of a "click here to order" button or other on-screen means, the ordering instructions must clearly and prominently state that a child must have a parent's permission to order.
3. In the case of an online means of ordering, there should be a clear mechanism after the order is placed allowing the child or parent to cancel the order.

Data Collection

The ability to gather information, for marketing purposes, to tailor a site to a specific interest, etc., is part of the appeal of the interactive media to both the advertiser and the user. Young children however, may not understand the nature of the information being sought, nor its intended uses. The solicitation of personally identifiable information from children (e.g., full names, addresses, email addresses, phone numbers) triggers special privacy and security concerns.

Therefore, in collecting information from children under 13 years of age, advertisers should adhere to the following principles:

1. In all cases, the information collection or tracking practices and information uses must be clearly disclosed, along with the means of correcting or removing the information. The disclosure notice should be prominent and readily accessible before any information is collected. For instance, in the case of passive tracking, the notice should be on the page where the child enters the site. A heading such as "Privacy", "Our Privacy Policy", or similar designation which allows an adult to click on to obtain additional information on the site's information collection and tracking practices and information uses is acceptable.

2. When personal information (such as email addresses or screen names associated with other personal information) will be publicly posted so as to enable others to communicate directly with the child online, or when the child will be able otherwise to communicate directly with others, the company must obtain prior verifiable parental consent.

3. When personal information will be shared or distributed to third parties, except for parties that are agents or affiliates of the company or provide support for the internal operation of the Website and that agree not to disclose or use the information for any other purpose, the company must obtain prior verifiable parental consent.

4. When personal information is obtained for a company's internal use, and there is no disclosure, parental consent may be obtained through the use of email coupled with some additional steps to provide assurance that the person providing the consent is the parent.

5. When online contact information is collected and retained to respond directly more than once to a child's specific request (such as an email newsletter or contest) and will not be used for any other purpose, the company must directly notify the parent of the nature and intended uses of the information collected, and permit access to the information sufficient to permit a parent to remove or correct the information.

In furtherance of the above principles, advertisers should adhere to the following guidelines:

1. The advertiser should disclose, in language easily understood by a child, why the information is being requested (e.g., "We'll use your name and email to enter you in this contest and also add it to our mailing list") and whether the information is intended to be shared, sold or distributed outside of the collecting advertiser company.

2. If information is collected from children through passive means (e.g., navigational tracking tools, browser files, etc.) this should be disclosed along with what information is being collected.

3. Advertisers should encourage the child to use an alias (e.g., "Bookworm", "Skater", etc.), first name, nickname, initials, or other alternative to full names or screen names which correspond with an email address for any activities which will involve public posting.

4. The operator should not require a child to disclose more personal information than is reasonably necessary to participate in the online activity (e.g., play a game, enter a contest, etc.).

5. The interactivity of the medium offers the opportunity to communicate with children through electronic mail. While this is part of the appeal of the medium, it creates the potential for a child to receive unmanageable amounts of unsolicited email. If an advertiser communicates with a child by email, there should be an opportunity with each mailing for the child or parent to choose by return email to discontinue receiving mailings.

Guidelines for the Advertising of 900/976 Teleprograms to Children

These guidelines, promulgated in 1989, have been superseded by a prohibition by the Federal Trade Commission that pay-per-call services cannot be directed to children under 12, unless the service is a

"bona fide educational service." Likewise, ads for 900-number services cannot be directed to children under 12, unless the service is a bona fide educational service per section 308.3 (d)(I) of the Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992.

The Children's Advertising Guidelines have been in existence since 1972 when they were published by the Association of National Advertisers, Inc. to encourage truthful and accurate advertising sensitive to the special nature of children. Subsequently, the advertising community established CARU to serve as an independent manager of the industry's self-regulatory program. CARU edited and republished the Self-Regulatory Guidelines for Children's Advertising in 1975, revising them periodically to address changes in the marketing and media landscapes. A major revision in 1996 added a new section addressing children's privacy and data collection on the Internet. The assistance of CARU's Advisory Board, and of other children's advertisers, their agencies and trade associations has been invaluable.

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