So You Want to Self-Regulate? The National Advertising Division As Standard Bearer

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HE FEDERAL TRADE COMMISSION has been an active proponent of industry self-regulation. The agency has recognized that industry cooperation can lead to efficiency, innovation, and the dissemination of useful information, which can benefit both consumers and competitors. Self-regulation also allows the FTC to conserve resources and direct them to high priority competition and consumer protection policy matters, while deferring to an industry that may be more capable of regulating its members than a government agency. Notwithstanding these benefits, a tension exists between industry self-regulation and competition law, in that certain cooperative activities can be ineffective substitutes for competition in promoting proper social policy, and industry cooperation can have exclusionary and anticompetitive effects. Because of this, the FTC has sought to limit its support for industry self-regulation to sound self-regulatory efforts likely to yield efficient and nondiscriminatory results.

Various self-regulatory initiatives recently have been proposed or currently are underway in diverse areas that include behavioral tracking, food marketing, and privacy and data security, among others. The National Advertising Division (NAD) of the Council of Better Business Bureaus, now in its forty-first year, is considered by many to be the standard against which these initiatives are compared. This article will discuss the strengths and weaknesses of the NAD, evaluate its performance in achieving its stated objective of promoting truthfulness and accuracy in national advertising, and consider how it effectively has managed to remain procompeti-

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tive. The article will conclude with direction for the many industries that have proposed self-regulation as an alternative to legislation or agency regulation.

The National Advertising Division

How It Works. Governed by the Advertising Self-Regulatory Council (ASRC) and administered by the Council of Better Business Bureaus (CBBB), the NAD was formed to promote truthfulness and accuracy in national advertising. The NAD reviews complaints about advertising claims filed by competitors and consumers and identified through its monitoring program. NAD attorneys determine whether the advertising at issue is substantiated and, if not, recommend that the campaign be discontinued or modified. NAD rules do not allow for discovery, and the process remains confidential until publication of the final case report, accompanied by a press release. Each decision summarizes the position of the advertiser and challenger, states the NAD's conclusion based on relevant law, and includes a brief response by the advertiser to the decision indicating the advertiser's intentions regarding the NAD recommendation.

The NAD reviews an average of 100 cases per year, and the entire process, from filing the complaint to its resolution, is intended to move more quickly (approximately sixty days to decision) and be less expensive than private litigation. While participation is voluntary, the NAD may refer a case to the appropriate regulatory agency, most commonly the FTC, if a challenged advertiser declines to participate in the process. The NAD also may refer to government agencies any participant that fails to comply with a decision for any reason.

FTC Commissioners have been consistent and vocal supporters of the NAD.² As they have noted, the NAD allows the Commission to spend less time on general industry supervision and devote its resources elsewhere.³ And when the Commission does act on matters previously before the NAD, the agency's actions, for the most part, have been consistent with the self-regulatory decision.

For example, in 2008, the FTC settled with Airborne for \$30 million, resolving allegations that the company made unsubstantiated claims that its effervescent tablets prevented colds.4 The FTC investigation and settlement followed a 2002 decision in which the NAD noted that, although Airborne had discontinued the advertising in question, all future advertising must comply with substantiation requirements.⁵ In a 2008 speech, FTC Commissioner J. Thomas Rosch noted that the company had not complied with the substantiation requirements outlined in the NAD decision, implying that, if it had, the company potentially could have avoided FTC investigation and enforcement. ASRC President and CEO (and former FTC attorney) Lee Peeler has noted that "the referral relationship shows ongoing strong support by the FTC for self-regulation and a high degree of effectiveness while preserving the fundamental distinctions between self-regulation and government regulation."7 Christopher Cole, Vice Chair of the ABA Section of Antitrust

Law Private Advertising Litigation Committee, has added, "[T]here can be little debate that the process has over many years improved the quality and truthfulness of advertising claims to the great benefit of industry and the consumer."8

What Works. The NAD incorporates elements of what the FTC has described as an effective self-regulatory program: external monitoring, mechanisms that encourage participation, and an adjudicatory process that relies on standards applicable to an entire industry.⁹

The NAD Procedures define "national advertising" as "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" that is disseminated nationally or to a substantial portion of the United States. ¹⁰ A "national advertiser" is anyone engaged in the creation or placement of national advertising. These broad definitions allow the NAD to monitor entire industries and scrutinize advertising in any medium.

The NAD also benefits from a high rate of voluntary industry participation. Advertisers are more likely to participate in the NAD process and comply with NAD decisions when the alternative risks adverse publicity or referral to the FTC. Moreover, allowing competitor challenges transforms the self-regulatory process into one that takes place in a competitive and adversarial, rather than collusive, forum and encourages a high degree of participation.¹¹

In 2012, the NAD published decisions in 93 cases—61 brought by competitors, 31 by routine monitoring, and one by a consumer group. In 2011, the NAD published decisions in 88 cases—50 brought by competitor challenges, 37 by routine monitoring, and one by a consumer group. Since 1997, the NAD has referred 21 cases to the FTC because of an advertiser's refusal to participate, and the largest number of advertisers that declined to participate in a single year was eight (2009). Jeff Greenbaum, an Executive Committee Member of the Promotions Marketing Association has observed that "NAD's decisions have become an important source of guidance for advertisers. . . . They have a huge influence on the decisions that advertisers are making." 12

Moreover, NAD decisions can influence court decisions in false advertising cases, ¹³ as courts often note a party's non-compliance with an NAD decision, although not as grounds for the holding. ¹⁴ "Although they conduct their own legal analysis, some judges seem to take comfort in ruling consistently with the NAD," states Christie Thompson, Chair of the ABA Section of Antitrust Law Consumer Protection Committee. ¹⁵

Several NAD procedures directly encourage participation. Section 2.1(E) of the Procedures, for example, requires that proceedings be kept confidential until a decision is released, and Section 2.1(F)(ii) prohibits parties to a decision from mischaracterizing the decision, disseminating it for advertising or promotional purposes, or issuing a press release regarding the decision.

The NAD has demonstrated its willingness to enforce these procedures, although sometimes this has produced mixed results. In October 2012, the NAD issued a press release citing participants Generac and Kohler for mischaracterizing its recommendation that Generac discontinue or modify promotional claims for its home generators and using the decision for promotional purposes. ¹⁶ In January 2013, the NAD reopened its review of the Living Essentials 5-Hour Energy claims after the company mischaracterized a 2007 NAD decision regarding its "no crash later" claim. ¹⁷ These procedures are intended to prevent advertisers from using the NAD process to gain a competitive advantage in the marketplace, which could create a disincentive to voluntary participation.

The NAD also helps ensure continued Commission support by responding to FTC initiatives and concerns about national advertising. In 2003, for example, the FTC issued its guidance regarding weight-loss advertising in an effort to encourage media self-regulation. Subsequently, many NAD decisions incorporated the FTC staff's direction and, in 2006, the NAD partnered with the Council for Responsible Nutrition (CRN) to monitor advertising for dietary supplements. Since its inception, the NAD (through its CRN initiative) has brought 25 out of 145 cases against dietary supplement manufacturers for allegedly unsubstantiated weight-loss claims.

From a financial perspective, the ASRC appreciates that "[s]ome industries, recognizing the need to heighten monitoring by advertising self-regulation, have stepped forward to support . . . increased monitoring[,]" and notes that "[t]he Council for Responsible Nutrition and Electronic Retailing Association are two outstanding examples of industries that support the independent and impartial monitoring work."²⁰ Former Commissioner Rosch has recognized partnerships such as these as effective and innovative self-regulation.²¹

What Doesn't Work. There are limitations and procedural shortcomings that make it more difficult for the NAD to realize its stated objective of promoting truthfulness and accuracy in advertising and jeopardize its high participation and compliance rates. As a private body, the NAD can only push so hard; it cannot issue subpoenas, hold hearings, or award damages. It also must rely on the FTC to enforce its decisions. The NAD cannot remove unsubstantiated advertising from dissemination, and failure to comply with a decision risks only FTC referral, not guaranteed action. Moreover, the FTC will not defer to NAD decisions, but will exercise its own independent judgment and review each case on the merits.²²

It is also questionable how much the threat of FTC involvement motivates participation and adherence. Many believe that it accomplishes its objective. Ron Urbach, Co-Chairman of the Advertising & Marketing Practice Group at Davis & Gilbert points out that, "[l]ike much in life, it is the threat of power that is more effective than the actual exercise of power. . . . [A]s long as the other side believes that this is a possibility, then the threat is effective." Since 2001, the FTC

has made public the results of only five of the 21 cases referred to it for refusal to participate in the NAD process. (The FTC settled with the advertiser in three cases, and received a favorable court ruling and issued a public closing letter in the other two.²³) This lack of publicity suggests that the FTC recognizes the negative consequences that FTC disagreement could have on the NAD's credibility.

Such disagreement likely exists, given that 16 of the referrals did not result in a public investigation or closing letter. Referral to the FTC can also be highly unsatisfying for the party challenging the advertiser. According to Christopher Cole,

[T]he referral process following noncompliance or refusal to participate is a mixed bag. The FTC inevitably follows up with the advertiser, but the timing and outcome is often not apparent to the challenger that brought the action. The confidentiality and the time lag inherent in the FTC referral process forces the challenger to consider suing to force compliance.²⁴

Significantly, the NAD process is taking longer than originally intended. Former FTC Chairman Deborah Platt Majoras noted that the prompt, flexible, and responsive NAD process is quicker than FTC enforcement or private litigation and "the more quickly a deceptive advertisement is identified and corrective action taken, the smaller the consumer injury." While in theory this should be the case, the NAD has consistently failed to meet its objective of resolution within sixty days, ²⁶ and cases now regularly take quite a bit longer. Lee Peeler explains:

[C]ases have become that much more complex Consequently, case records have become that much more voluminous and detailed. [Moreover, t]he original 60-day time frame did not contemplate meetings [with the advertiser and challenger] at all and represents a scenario where no party requests an extension and where the Advertiser's Statement is submitted as scheduled.²⁷

While this is undoubtedly the case, the added time to decision means that challengers requiring quick action are left with very few options, and often must seek a temporary restraining order or preliminary injunction under the Lanham Act. Amy Mudge, Chair of the ABA Section of Antitrust Law Private Advertising Litigation Committee, suggests that companies in need of immediate action seek a preliminary injunction or temporary restraining order:

If they do not have what they need to do that and want to rely on NAD's standards that put the burden [of proof] on the advertiser to substantiate claims and want a quick result, more companies should take advantage of the expedited procedures where the second round of briefing is eliminated.²⁸

Of course, the expedited procedures require that the challenger forgo its substantive written response, a step few challengers are willing to take.

Indeed, a desire for shorter timelines has been a persistent objective of the NAD in recent years, but it is a problem that remains unresolved, with little progress expected unless addi-

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tional staff is added or a change in practice implemented. (Shorter decisions has been one proposal.) In any event, as Ronald Urbach points out, "the court option is sometimes not any quicker, certainly is more expensive[,] and may be more of a wild card in terms of a result."²⁹

The high cost of filing a competitor challenge before the NAD also has become prohibitive for some complainants. CBBB Corporate Partners must pay a \$5,000 filing fee, but non-members are required to pay as much as \$20,000 per filing. The fee is \$6,000 for non-member challengers whose gross annual revenue is less than \$400 million, \$10,000 if their gross annual revenue is more than \$400 million but less than \$1 billion, and \$20,000 if their gross annual revenue is \$1 billion or more. While, as Christopher Cole points out, "the filing fee provides a modest disincentive for challengers to abuse the NAD process by filing frivolous challenges," if costs continue to increase, it may have the effect of excluding certain participants, which in turn could call into question the forum's procompetitiveness.

Another problem concerns the increase in the number of consumer class action lawsuits following the publication of NAD decisions. This is a real concern for many national advertisers, and some have refused to participate and instead have elected to engage their competitors in confidential mediation. Since 2003, plaintiffs' attorneys have filed 59 class action complaints on behalf of consumers that explicitly cite an adverse NAD decision as either the basis for the lawsuit or evidence of a violation of state false advertising law.³² Fortyseven of those complaints, or just under 80 percent, have been filed since 2009, with an average of 12 filed per year.³³ Although very few of these cases have advanced past the class certification stage, the mere filing presents a costly headache that companies expect to avoid when deciding to participate in industry self-regulation.

In an attempt to control this increase in consumer class action lawsuits, the ASRC amended the NAD Procedures in 2012 to state that "[a]ny decision finding that advertising has been substantiated should not be construed as an endorsement. Correspondingly, an advertiser's voluntary modification of advertising, in cooperation with NAD . . . self-regulatory efforts, is not to be construed as an admission of any impropriety." ³⁴

While there is probably not much more the NAD could do about a process that relies on the publication of case deci-

sions to instill discipline among national advertisers, this amendment is unlikely to dissuade the plaintiffs' bar, armed with an independent determination that the advertising is deceptive, from filing class action lawsuits. The problem also is not specific to the NAD but, instead, is a consequence of "the proliferation of class actions in general in the consumer protection and advertising area," notes Ronald Urbach.³⁵ Christie Thompson adds that "[p]iggyback class actions are becoming increasing threats in connection with all consumer protection matters, including FTC settlements, which often include a statement that the settlement does not constitute an admission by the respondent."³⁶ And Amy Mudge has offered the following recommendations:

[The] NAD needs to do more to address [the class action problem], including the tone of its press releases and its decisions. NAD is making decisions on a limited record and often interpreting claims. Writing conclusions like "reasonable consumers would takeaway..." is just a license for trouble and not fact-based. NAD decides what reasonable interpretations some consumers might takeaway. This is a very different exercise than what a class action plaintiff needs to show to certify a class. If more of the gray in these decisions was clearer, all parties would be better off.³⁷

The increase in class actions that piggyback off an NAD decision could threaten participation rates and push companies into private mediation. Practitioners report that this is already occurring among certain companies that are concerned about having to incur the cost of defending consumer class actions, even if there is a low likelihood that the relevant class might be certified.

From its perspective, the NAD responds that mediation lacks the credibility of the self-regulatory process. Lee Peeler explains, "It does not create or follow a precedent based system of dispute resolution, protect the interest of the general public as well as the interest of competitors, or establish a public record of self-regulation to demonstrate industry commitment to high standards of truth and accuracy." While this view is certainly correct, the concern remains and warrants further monitoring.

Lessons for Self-Regulatory Success

While the self-regulatory program administered by the NAD is not perfect, it offers a useful benchmark for other self-regulatory programs. Perhaps most importantly, to succeed, industry self-regulatory programs should promote an adjudicatory process with procedures that encourage broad participation. For this reason, initiatives like the Electronic Self-Regulatory Program (ERSP) have proven more successful than the various attempts at online privacy self-regulation.

ERSP was formed in 2004 to regulate false and unsubstantiated claims in electronic direct response marketing, typically in infomercials. Administered by the Electronic Retail Association, ERSP is modeled after the NAD and thus reviews complaints and issues decisions in accordance

with similar procedures. Its standards and decisions apply to all direct response marketers, as well as to networks airing unsubstantiated advertisements.³⁹ ERSP boasts a high participation rate and a 70 percent compliance rate and has earned FTC Commissioner recognition as a successful self-regulatory program.⁴⁰

The Online Interest-Based Advertising Accountability Program regulates online behavioral advertising. The Program enforces seven principles of online behavioral advertising and monitors compliance with the principles and with an "Advertising Option Icon" that indicates when advertisements or web pages collect and use data for behavioral advertising. The Program monitors all parties involved in the behavioral marketing process, including the advertiser, media agency, ad server, and ad network. 41 Like the NAD and ERSP, both consumers and competitors may bring complaints, and decisions are public. The Program also may refer parties that refuse to participate or comply with a decision to the FTC.⁴² The FTC has commended the Program, 43 which released its first decision against Kia in October 2012, finding that the company, its media agency, and its ad network violated the transparency principle by failing to display the "Advertising Option Icon" on its web page and in advertisements.⁴⁴

The Children's Food & Beverage Advertising Initiative (CFBAI) was founded in 2006 to help combat childhood obesity by offering healthier food and beverage choices in advertising directed towards children ages twelve and under. It has achieved success, with sixteen committed participants and some six new members since its founding. Jim Davidson, Chair of the Public Policy Practice Group at Polsinelli Shughart and longtime counsel to food product advertisers, estimates that these sixteen current members account for greater than 80 percent of food advertising currently being disseminated.⁴⁵

There have been few prominent CFBAI decisions despite the CBBB's commitment to monitor compliance and respond to public inquiries. Perhaps recognizing the need for increased applicability, in 2010, the Initiative amended its core principles to broaden the definition of national advertising, which now includes advertising on mobile devices, and to require that 100 percent of all advertisements directed towards children be for "healthier foods," as opposed to 50 percent. 46 Jim Davidson also notes that, "[i]n addition, food industry leaders have committed significant resources to helping educate school-age children and their parents throughout the country about nutrition and healthy lifestyles through the Healthy Weight Initiative Foundation. It demonstrates that the industry is willing to commit to constructive changes while opposing unconstitutional restrictions on commercial speech."47

Efforts to self-regulate privacy and data security have enjoyed less success. The industry lacks both a self-regulatory code and a monitoring body, and past attempts at industry self-regulation have failed. In the 1990s, the Online Privacy Alliance (OPA) issued Guidelines for online privacy

in response to an FTC demand for industry self-regulation. The Guidelines received limited industry participation—approximately 100 companies, with big players like Amazon notably absent—and lacked a process for monitoring and disciplining non-compliant members. 49

The Network Advertising Initiative (NAI), created in the early 2000s, also failed due to monitoring issues. ⁵⁰ Under the NAI, independent third-party TRUSTe was responsible for enforcing NAI's privacy principles through routine monitoring and responding to consumer complaints. The NAI was responsible for sanctioning non-compliant members by revoking membership, notifying the FTC and the public, or both. However, TRUSTe gradually stopped reporting consumer complaints, ⁵¹ and the NAI failed to sanction or refer non-compliant members. ⁵²

Conclusion

The NAD serves as the standard against which other self-regulatory initiatives should be measured. It conducts external monitoring, adjudicates industry compliance with broad standards, and fosters voluntary industry participation. The increase in the length of time between filing a complaint and rendering a decision, the cost of filing a complaint, and the number of consumer class actions filed in response to NAD decisions could jeopardize the NAD's high participation rate and its status as the forum-of-choice for competitor challenges. Efforts should be made to address these potential problems in order to strengthen the overall program.

Industry self-regulation works "if it is effective and has the respect of all of the constituencies—consumers, regulators, and industry. This is why the NAD is such a success." Companies, regulators, and consumer advocates looking to improve or develop successful self-regulatory programs should look to the strengths of the NAD and create adjudicatory bodies that actively monitor for industry compliance with broad standards of consumer protection, and avoid implementing procedures that threaten participation. A strong, effective self-regulatory program should receive FTC support and prompt industry participation. More importantly, it is likely to work.

- ¹ See Advertising Self-Regulatory Council, Procedures for the National Advertising Division (NAD), The Children's Advertising Review Unit (CARU) & the National Advertising Review Board (NARB) §§ 2.4–2.9 (Sept. 24, 2012), available at http://www.asrcreviews.org/wp-content/uploads/2012/10/NAD-CARU-NARB-Procedures-Updated-10-9-12.pdf [hereinafter Procedures]. The process is intended to take 55 business days. Once a challenge is filed, the advertiser is given 15 days to respond. *Id.* § 2.5. The challenger has 10 days to respond to the advertiser, who then has 10 days to respond to the challenger's response. *Id.* §§ 2.6(A), 2.7. The NAD renders its decision within 15 days of the last response, and the advertiser has 5 days to submit its statement before publication of the decision. *Id.* § 2.9(A)–(B). The process may take longer if the NAD requests additional comments from or meetings with the parties. *Id.* § 2.8.
- 2 See, e.g., Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, Keynote Address Before the National Advertising Division: Helping the FTC Help You: Effective Self-Regulation Is Better Business (Sept. 26, 2005), available at http://www.ftc.gov/speeches/harbour/050926selfreg.pdf; Jon Leibowitz, Comm'r, Fed. Trade Comm'n, Remarks Before the National Advertising Division Annual Conference: Truth or Consequences: The FTC Approach to Advertising (Sept. 24, 2007), available at http://www.ftc.gov/ speeches/leibowitz/070924bbbremarks.pdf; Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address Before the Council of Better Business Bureaus: Self-Regulatory Organizations and the FTC (Apr. 11, 2005), available at http://www.ftc.gov/speeches/majoras/050411self regorgs.pdf; Robert Pitofsky, Chairman, Fed. Trade Comm'n, Remarks at the D.C. Bar Association Symposium: Self-Regulation and Antitrust (Feb. 18, 1998), available at http://www.ftc.gov/speeches/pitofsky/self4.htm; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks Before the NAD Annual Conference 2008: Self-Regulation and Consumer Protection: A Complement to Federal Law Enforcement (Sept. 23, 2008), available at http://www.ftc.gov/speeches/rosch/080923Rosch-NADSpeech.pdf.
- 3 See Rosch, supra note 2, at 11.
- ⁴ See Press Release, Fed. Trade Comm'n, Makers of Airborne Settle FTC Charges of Deceptive Advertising; Agreement Brings Total Settlement Funds to \$30 Million (Aug. 14, 2008), available at http://www.ftc.gov/opa/2008/08/airborne.shtm.
- ⁵ See Knight-McDowell Labs, NAD Case No. 3862 (Jan. 7, 2002) (on file with author).
- ⁶ See Rosch, supra note 2, at 18.

- ⁷ E-mail from C. Lee Peeler, Pres. & CEO, ASRC, to author (Jan. 28, 2013) (on file with author).
- E-mail from Christopher Cole, Partner, Crowell & Moring, to author (Jan. 24, 2013) (on file with author).
- ⁹ See Fed. Trade Comm'n, Fair Information Practice Principles (2012), available at http://www.ftc.gov/reports/privacy3/fairinfo.shtm (discussing enforcement and redress via self-regulation in the online privacy industry).
- ¹⁰ Procedures, supra note 1, § 1.1.
- 11 See Leibowitz, supra note 2 (recognizing that "major, global" companies with an interest in protecting their brands bring challenges before the NAD).
- ¹² E-mail from Jeffrey A. Greenbaum, Partner, Frankfurt Kurnit Klein & Selz, to author (Jan. 28, 2013) (on file with author).
- ¹³ Jeffrey S. Edelstein, Self-Regulation of Advertising: An Alternative to Litigation and Government Action, 43 IDEA 509, 529 (2003).
- ¹⁴ See, e.g., Am. Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160 (2d Cir. 1978).
- ¹⁵ E-mail from Christie Thompson, Partner, Kelley, Drye & Warren, to author (Jan. 28, 2013) (on file with author).
- See Press Release, Advertising Self-Regulatory Council, NAD Finds Generac Violated NAD Procedures in Communication to Customers (Oct. 11, 2012), available at http://www.asrcreviews.org/2012/10/nad-finds-generac-violated-nad-procedures-in-communication-to-customers/; see also Press Release, Advertising Self-Regulatory Council, NAD Again Finds Nilfisk-Advance Violated NAD Procedures Through Use of a Decision for Promotional Purposes (Apr. 11, 2012), available at http://www.asrcreviews.org/2012/04/nad-again-finds-nilfisk-advance-violated-nad-procedures-through-use-of-a-decision-for-promotional-purposes/.
- Barry Meier, Energy Shot's 'No Crash' Claim Is Disputed by Watchdog, N.Y. TIMES, Jan. 2, 2013, at B1, available at http://www.nytimes.com/2013/01/03/business/5-hour-energys-no-crash-later-claim-is-disputed.html?_r=0.
- ¹⁸ See Fed. Trade Comm'n, Deception in Weight-Loss Advertising Workshop: Seizing Opportunities and Building Partnerships to Stop Weight-Loss Fraud (2003), available at http://www.ftc.gov/os/2003/12/031209weightloss rpt.pdf.
- 19 COUNCIL FOR RESPONSIBLE NUTRITION, COMPILATION OF NAD CHALLENGES, http://www.crnusa.org/NAD/data-2-5.html (last visited Feb. 1, 2012).
- ²⁰ Peeler, supra note 7.
- ²¹ See Rosch, supra note 2, at 13-14.

- FTC Policy Statement Regarding Advertising Substantiation, appended to Thompson Med. Co., 104 F.T.C. 648, 839 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), available at http://www.ftc.gov/bcp/guides/ad3subst.htm.
- ²³ See FTC v. Alcoholism Cure Corp., No. 3:10-CV-266, 2010 WL 4840046 (M.D. Fla. Nov. 23, 2010); Oreck Corp., 151 F.T.C. 289 (2011); Cytodyne, LLC, 140 F.T.C. 191 (2005); Sanofi-Synthélabo, 138 F.T.C. 478 (2004); Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Dwight D. Lueck, Barnes & Thornberg LLP (Nov. 9, 2011), available at http://www.ftc.gov/os/closings/111114kentnutritioncletter.pdf (declining to pursue enforcement action).
- ²⁴ Cole, supra note 8.
- ²⁵ Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address Before the Electronic Retailers Self-Regulatory Program: Self Regulation in the Infomercial Industry: Moving Forward 2 (Apr. 26, 2006), available at http:// www.ftc.gov/speeches/majoras/060503eraspeech.pdf.
- ²⁶ See supra note 1.
- ²⁷ Peeler e-mail, supra note 7.
- ²⁸ E-mail from Amy Ralph Mudge, Partner, Venable, to author (Jan. 28, 2013) (on file with author).
- ²⁹ E-mail from Ronald Urbach, Partner, Davis & Gilbert, to author (Jan. 25, 2013) (on file with author).
- 30 PROCEDURES, supra note 1, § 2.2(A)(ii).
- 31 Cole, supra note 8.
- 32 Westlaw search for "national advertising division" and "class action."
- $^{\rm 33}$ Eight complaints were filed in 2009, 16 in 2010, 10 in 2011, and 13 in 2012.
- 34 Procedures, supra note 1, § 2.1(F)(i) (emphasis added).
- 35 Urbach, supra note 29.
- ³⁶ Thompson, supra note 15.
- 37 Mudge, supra note 28.
- 38 Peeler, supra note 7.
- ³⁹ See, e.g., Press Release, Fed. Trade Comm'n, Marketers of 7 Day Miracle Cleanse Program Banned from Infomercials (Feb. 27, 2008), available at http://www.ftc.gov/opa/2008/02/7day.shtm.
- 40 Majoras, supra note 25, at 7, 15.
- ⁴¹ See, e.g., Cotton Delo, Industry Group Calls Out Kia for Not Disclosing Behavioral Ads, ADVER. AGE, Oct. 1, 2012, available at http://adage.com/ article/digital/industry-group-cites-kia-disclosing-behavioral-ads/237513/.
- ⁴² See National Advertising Review Council, Online Internet-Based Advertising Accountability Program Procedures § 2.2(H) (Aug. 2011), available at http://www.bbb.org/us/storage/113/documents/online-behavioral-advertising/OAB_Procedures.pdf.
- ⁴³ See Press Release, Digital Adver. Alliance, White House, DOC and FTC Commend DAA's Self-Regulatory Program to Protect Consumer Online Privacy (Feb. 23, 2012), available at http://www.aboutads.info/resource/download/DAA%20White%20House%20Event.pdf.
- 44 See Delo, supra note 41.
- ⁴⁵ See E-mail from Jim Davidson, Partner, Polsinelli Shughart, to author (Jan. 25, 2013) (on file with author).
- ⁴⁶ See Council of Better Business Bureaus, The Children's Food & Beverage Advertising Initiative: A Report on Compliance and Progress During 2011, at 3 (2012) available at http://www.bbb.org/us/storage/16/documents/cfbai/CFBAl%20Report%20on%20Compliance%20and%20 Progress%20During%202011.pdf.
- ⁴⁷ Davidson, supra note 45.
- ⁴⁸ Dennis D. Hirsch, The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?, 34 SEATTLE U. L. REV. 439, 459–60 (2011).
- ⁴⁹ *Id.* at 460.
- ⁵⁰ Id. at 463-64.
- ⁵¹ *Id.* at 463.
- ⁵² Id.
- 53 Urbach, supra note 29.