



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Bureau of Competition

Alden F. Abbott  
Assistant Director for Policy and Evaluation

Direct Dial  
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January 29, 2004

Mr. Jerald A. Jacobs  
Shaw Pittman LLP  
2300 N. Street, NW  
Washington, DC 20037-1128

Dear Mr. Jacobs:

This letter responds to your request on behalf of the Electronic Retailing Association (“ERA”) for a Bureau of Competition staff (“BC staff”) opinion letter regarding a proposed program to review and, if appropriate, recommend discontinuation of DRTV (“direct response television”) shows (*e.g.*, infomercials) and advertising in other media that contain claims that appear on their face to be unreasonable or incapable of substantiation.<sup>1</sup> You have asked whether, based on the facts submitted, BC staff would recommend that the Commission bring an enforcement action challenging implementation of the program. On the basis of information that you provided in your letter of December 23, 2003, BC staff have no present intention to recommend a challenge to ERA’s implementation of the DRTV review program as proposed. This conclusion is entirely dependent on the accuracy of our understanding of pertinent facts concerning the review program. Our understanding of those facts, in turn, is entirely dependent on the information that you provided. Our present enforcement intentions might be different should the DRTV review program not be as described in your letter and other materials.

**ERA’s Proposed Program**

We understand that ERA is the nation’s principal trade association representing the electronic retailing/DRTV industry. ERA’s membership includes DRTV producers, media buyers, product owners, consultants, and other industry firms.

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<sup>1</sup>Letter of December 23, 2003 from Jerald A. Jacobs to Alden Francis Abbott, Assistant Director for Policy and Evaluation, Bureau of Competition.

We further understand that ERA proposes to establish a separate unit under the umbrella of the National Advertising Review Council (“NARC”) to perform the review function.<sup>2</sup> We also understand that the new unit will be funded by ERA, and operate under the rules and procedures set forth in ERA’s proposal, but would otherwise be under NARC supervision and independent of ERA. The new unit will initially be staffed by one attorney, experienced in advertising law and ad substantiation, who will be selected by and work under the supervision of NARC, although ERA may participate in the interviewing process and provide guidance on selection standards and process.

We understand that the review program is intended to identify and effectuate discontinuance of advertising that contains claims that appear to be untrue and lack any form of credible substantiation. The single mission of the review program is to curtail false or deceptive DRTV advertising for the benefit of consumers.

We further understand that reviews may be initiated by the new unit on its own initiative or in response to referrals by any ERA member, consumer, or consumer advocacy group. Decisions on whether to review a referral will be based on the number of consumers affected, the type of advertising claims involved – ERA proposes that the reviewing unit focus on advertising campaigns that involve “high impact” on consumers, such as when health or safety issues are involved – and how egregious the advertising claims appear to be.

We understand that the reviewing unit will notify the marketer whose advertising campaign is under review, and may request product samples and additional information and/or documentation from the marketer as needed. The review will be limited to the primary or core efficacy or performance claims. The marketer will be required to provide the requested materials within 15 calendar days, and, within those 15 days, may request a meeting with the reviewer, which meeting shall be held within 15 calendar days of the request. The reviewing unit will make a decision and notify the marketer within 15 calendar days after receipt of the final submission from the marketer or within 15 calendar days of the meeting.

### Review Standards

We understand that the review will consist of:

- Determination/identification of claims;

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<sup>2</sup>We understand that NARC is a strategic alliance of the advertising industry and the Council of Better Business Bureaus (“CBBB”), formed in 1971 by the Association of National Advertisers, Inc., the American Association of Advertising Agencies, Inc., the American Advertising Federation, Inc., and the CBBB to foster truth and accuracy in national advertising through voluntary self-regulation.

- Determination whether substantiation for claims appears reasonable on its face, *e.g.*,
  - i) Does the substantiation address the claims being made?
  - ii) If applicable, does the substantiation meet general standards of competent and reliable scientific evidence?

We understand that the review is intended to be limited, with the goal of identifying “outliers” – egregious primary or core advertising claims that on their face appear unreasonable or incapable of substantiation. The reviewing unit will recommend whether the primary or core claims that were reviewed should be continued. The reviewing unit is not expected to (but may) make recommendations regarding how claims should be modified or qualified. The proposed program does not include provisions for appeal of the reviewing unit’s decisions.

#### Enforcement

We understand that failure to comply with the reviewing unit’s recommendation to discontinue a claim will result in a referral to the FTC or other appropriate agency and expulsion from membership in ERA. Failure to comply with a request for information or other materials also may result in referral to the FTC or other agency. Decisions of the reviewing unit will be made public through publication in NARC reports. Review decisions and referrals to the FTC or another agency will also be announced in NARC press releases. Conclusions of the reviewing unit will be qualified – *e.g.*, “based on preliminary evaluation, it appears that certain advertising claims may not be adequately substantiated.”

Finally, we understand that ERA contemplates that publication of the reviewing unit’s decisions and actions will benefit ERA members and suppliers such as fulfillment companies, telemarketing companies, and media services by providing information that will assist them in making independent decisions regarding whether to provide goods or services to a non-compliant company.

#### **Analysis of the ERA Proposed DRTV Review Program**

We begin with the observation that the antitrust laws do not forbid legitimate self-regulation that benefits consumers. As the Commission has stated, “[s]uch self-regulatory activity serves legitimate purposes, and in most cases can be expected to benefit, rather than to injure, competition and consumer welfare.” *American Academy of Ophthalmology*, 101 F.T.C. 1018 (1983) (advisory opinion); *see also American Medical Association*, 117 F.T.C. 1091 (1994) (advisory opinion); *American Medical Association*, 94 F.T.C. 701, 1029 (1979), *aff’d as modified*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided Court*, 455 U.S. 676 (1982) (“AMA”). On the other hand, conduct that unreasonably restricts competition is inconsistent with the antitrust laws.

We also note at the outset that ERA's DRTV review program is in many respects similar to a standard-setting and standard-compliance program, and that precedents dealing with these kinds of programs are therefore helpful in the analysis of the ERA's proposed program.<sup>3</sup> Specifically, under the review process, recommendations regarding whether ERA members should continue or discontinue an advertiser's commercial will depend on whether the commercial satisfies a standard of reasonableness (capacity to be substantiated) with respect to the claims made in the commercial. The reasonableness standard, in turn, is solely determined by ERA through NARC. ERA, through NARC, is thus, in this respect, both a standard-setting body and an evaluator of compliance with the adopted standard.

As a general principle, industry adoption of private standards and voluntary compliance with those standards often, if not typically, promote competition by enhancing price and quality rivalry and by increasing consumer confidence in product quality and thereby increase demand, and facilitate entry of new sellers. It is inherent in a standards system, however, that some products may fail to satisfy the standards, and therefore may tend to be excluded from the marketplace. This effect is not inherently anticompetitive, but an unreasonable restraint on competition may arise under some circumstances. For this reason, the actions of standard-setting bodies are subject to scrutiny under the antitrust laws.<sup>4</sup> *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572-73 (1982).

Competitive concerns can arise, for example, when competitors abuse or distort the use of standards for the purpose of restricting competition, thus imposing harm on the market and consumers while not providing the procompetitive benefits that can flow from compliance with industry standards.<sup>5</sup> In addition, the adoption of an industry standard may, in effect, be an

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<sup>3</sup>There is one significant difference between the ERA's proposed program and standardization programs. An industry group might voluntarily adopt standard specifications to ensure that its members offer particularly high quality products or products that appeal to specific consumer preferences (like a preference for "organic" food). Many consumers may prefer non-standard offerings (perhaps at lower prices), however, and it is therefore necessary to consider whether the standardization program will foreclose competition from non-compliant sellers and thus reduce output and consumer welfare. Because the ERA's program does not establish product standards but seeks only to exclude egregiously false claims, it is not necessary to be concerned about an adverse effect on competitive opportunities for products that are deceptively promoted.

<sup>4</sup>The actions of groups or associations such as ERA comprised of entities with horizontal business relationships (*i.e.*, competitors) are deemed, under the antitrust laws, to be concerted action.

<sup>5</sup>*E.g., Allied Tube*, 486 U.S. at 501; *Accrediting Commission on Career Schools and Colleges of Technology*, 119 F.T.C. 977 (1995) (advisory opinion; Commission declined to approve a proposed accreditation standard that would define acceptable tuition levels, reasoning

agreement not to sell non-compliant products.<sup>6</sup> Competitive concerns may arise when the standard is not reasonably necessary to attain procompetitive objectives.<sup>7</sup>

ERA's adoption of the proposed review program would be an agreement among competitors to restrict a certain kind of DRTV advertising, *i.e.*, advertising that does not meet ERA/NARC substantiation standards. As such, it raises two potential antitrust concerns. First, the program could be characterized simply as a non-competition agreement, *i.e.*, an agreement among ERA members, by means of enforcement of a standard, not to compete for the business of particular advertisers. Second, the expulsion from ERA of a member that refuses to comply with the review program requirements could be characterized as a group boycott.

BC staff would analyze both of these issues under the "rule of reason" test rather than the *per se* test.<sup>8</sup> Under a rule of reason test, BC staff weighs the potential for competitive harm arising from an agreement among competitors against any procompetitive or efficiency benefits produced by the agreement. If BC staff concludes that the procompetitive benefits more than offset the likely competitive harm, BC staff will not pursue an enforcement action. Given the facts as we understand them in this instance, it is unlikely that BC staff would conclude that potential anticompetitive effects arising from the implementation of ERA's DRTV review program would outweigh procompetitive benefits. We find therefore that ERA's DRTV review program does not merit a staff recommendation to the Commission for enforcement action at this time. We reach this conclusion for a number of reasons.

First, truthful, non-deceptive advertising promotes competition by providing consumers with important information about product prices, quality, and availability, among other factors that consumers consider in their purchasing decisions. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Agreements on standards among competitors that restrict truthful, nondeceptive advertising, therefore, have the potential to restrict competition and harm consumers. *See, e.g., American Medical Association*, 94 F.T.C. at 1005. Such agreements harm consumers by raising the cost of finding the combination of price, service, and quality that best fits their needs and by reducing the incentive for firms to compete (by preventing them from informing consumers of their prices, services, or quality). *Id.* By contrast, false or deceptive advertising does not produce the same benefits for consumers as truthful advertising, and, therefore, agreements among competitors on

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that this would in effect be an agreement among members of the accrediting body to charge no more than the standard would permit).

<sup>6</sup>*Id.*

<sup>7</sup>*E.g., American Soc'y of Sanitary Eng'rs*, 106 F.T.C. 324 (1985) (consent order).

<sup>8</sup>Specifically, BC staff's analysis would follow the framework set out in the Federal Trade Commission/Department of Justice Guidelines for Collaborations Among Competitors, available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

standards that are aimed at restricting deceptive advertising present less antitrust concern; indeed, restricting deceptive advertising may help *avoid* anticompetitive effects. *Calif. Dental Assn. v. FTC*, 526 U.S. 756, 773 n.9 (1999) (“That false or misleading advertising has an anticompetitive effect, as that term is customarily used, has been long established.”) ERA’s review program appears to fall into this second class of restrictions.

Second, both the agreement to adopt a standard and the standard itself are not product or advertiser-specific. Because ERA represents a wide spectrum of marketers that use DRTV advertising, the agreement would relate to a class of advertising rather than specific products. That fact would attenuate any adverse consumer impact.

Third, ERA’s proposed program appears to have a significant pro-consumer rationale by restricting advertising that is deemed to be facially unreasonable or incapable of substantiation. According to ERA, the overriding purpose of the proposed program is to curtail false or deceptive DRTV advertising, rather than to restrict competition. The restriction of such advertising likely would increase consumer confidence in DRTV and make the overall market more efficient. *See Calif. Dental Assn. v. FTC*, 526 U.S. at 771-772 (restrictions designed for the purpose of avoiding false or deceptive advertising might plausibly have a net procompetitive effect).

Fourth, the review program will be administered under the umbrella of NARC and not directly by ERA. Although, because of ERA funding and participation in staff interviewing, the reviewing unit cannot be characterized as fully independent of ERA, there is nonetheless some degree of separation between the reviewing unit and ERA respecting the actual screening and decision-making process. This separation tends to lessen the possibility that the program could be manipulated by horizontal competitors for the purpose of restraining competition for their products.<sup>9</sup> Furthermore, NARC will control the rules and procedures used by the reviewing unit after formation.

Fifth, while the expulsion of a member for non-compliance with program requirements could be characterized as a horizontal boycott, there will not be an effect on competition in the marketing of the expelled member’s product unless two or more members actually compete in the marketing of that product or reasonable substitutes. Further, even if there is extant competition with respect to the marketing of that particular product, expulsion of a non-compliant member may not be unreasonably exclusionary. In general, expulsion from a trade group characteristically is not likely to result in predominantly anticompetitive effects. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 286 (1985). According to ERA, membership does not have significant competitive ramifications. Although loss of membership results in the loss of ERA’s trade association services, those services are not essential to competition or competitors.

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<sup>9</sup>Evidence to the contrary would cause serious antitrust concerns.

Finally, we understand that ERA plans to encourage members not to deal with marketers that refuse to comply with the reviewing unit's procedures and decisions. BC staff would not recommend enforcement action by virtue of ERA simply encouraging members not to deal with non-compliant marketers, so long as the actions of the members remain voluntary. By contrast, a requirement that members refrain from dealing with such marketers could be viewed as a boycott or an agreement not to compete for that marketer's business, and therefore may be subjected to heightened BC staff scrutiny.

### **Conclusion**

For all the reasons stated above, we believe that, on balance, the likely benefits of ERA's proposed review program more than offset the potential for competitive harm. On this basis, BC staff have no present intention to recommend a challenge to ERA's proposed DRTV review program.

This letter sets out the views of the staff of the Bureau of Competition, as authorized by Rule 1.1(b) of the Commission's Rules of Practice, 16 C.F.R. § 1.1(b). Under Commission Rule 1.3(c), 16 C.F.R. § 1.3(c), the Commission is not bound by this staff opinion and reserves the right to rescind it at a later time. In addition, this Office retains the right to reconsider the questions involved and, with notice to the requesting party, to rescind or revoke the opinion if implementation of the proposed program results in substantial anticompetitive effects, if the program is used for improper purposes, if facts change significantly, or if it would be in the public interest to do so.

Sincerely yours,

Alden F. Abbott  
Assistant Director  
for Policy & Evaluation