

American National Standards Institute
Conference on Building Consumer Confidence
Remarks of Lydia Parnes
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Introduction

Thank you for inviting me to participate in this panel. I look forward to a robust and spirited discussion. Let me start my remarks by giving you some context about the FTC. The FTC is a law enforcement agency. Although we issue and enforce rules, we do not engage in public standard setting. While I can't address the current product safety system or its potential evolution, I do plan to discuss the FTC's extensive experience in promoting and supporting self-regulation, including voluntary standards. My hope is that my remarks can inform your discussions as you consider the feasibility of a product safety self-regulatory scheme.

The FTC frequently partners with self-regulatory bodies in order to leverage our impact. This approach is especially useful where the scope of a problem may be too widespread for an agency with limited resources to handle, or where our jurisdiction to handle particular matters may be constrained by constitutional principles. And, we have long expressed the belief that effective industry self-regulation can have significant benefits, and can, in specific instances, address problems more quickly, creatively, and flexibly than government regulation.

We tend to focus our enforcement efforts on actions that have the greatest deterrent effect on unlawful industry behavior. Self-regulatory organizations can complement these efforts by providing, among other things, complaint resolution, quality assurance, best practices, and standards. When it works, an effective self-regulatory program helps raise the level of industry compliance with the laws that the FTC enforces.

So, what are the hallmarks of the best self-regulatory programs? They clearly address the problems they seek to remedy; they are flexible and able to adapt to new developments within the industry; they are enforced and widely followed by affected industry members; they are visible and accessible to the public; they are independent from their member firms; and they objectively measure member performance and impose sanctions for noncompliance.

This is what I call "self-regulation with teeth."

There are a number of examples of effective self-regulatory programs that fit these criteria: (1) the advertising codes administered by each of the three major alcohol industry associations;¹ (2) the video game industry codes;² and (3) the recently organized Children's Food

¹ The Beer Institute's "Advertising and Marketing Code" is available at www.beerinstitute.org/tier.asp?bid=249; the Distilled Spirits Council of the United States'

and Beverage Advertising Initiative of the Council of Better Business Bureau.³ To highlight the power of our private/public partnerships, I would like to discuss two particularly strong self-regulatory initiatives – first the BBB’s self-regulatory oversight of national advertising, and then the US/EU safe harbor framework on data transfers.

BBB's Self-Regulatory Programs: NAD/CARU/ERSP

One of our primary partners in self-regulation is the National Advertising Division of the Better Business Bureau, typically referred to as NAD. Complaints come from competitors, from consumers, and also from NAD’s own monitoring of traditional and new media.⁴ In investigating challenges to a particular company’s advertising, the NAD enforces FTC-like standards for truth and accuracy in advertising. Most NAD inquiries are resolved at this level; if, however, the advertiser is not satisfied with the NAD’s decision, the matter may be appealed to the National Advertising Review Board, or NARB.⁵ Then, if the advertiser refuses to comply with the decision of NAD or of the NARB, the matter may be referred to the FTC for resolution.⁶

The FTC has similar referral arrangements with other BBB-created self-regulatory programs, including the Electronic Retailing Self-Regulation Program (ERSP)⁷ and the Children’s Advertising Review Unit (CARU).⁸

This self-regulatory program of graduated enforcement is working well. Since 2004, we have received 44 NAD referrals, 14 ERSP referrals, and, since 2005, 9 referrals from CARU.

“Code of Responsible Practices for Beverage Alcohol Advertising and Marketing” is available at www.discus.org/responsibility/code/read.asp; the “Wine Institute’s Code of Advertising Standards” is available at www.wineinstitute.org/programs/adcode/.

² The Entertainment Software Rating Board’s “Principles and Guidelines for Responsible Advertising Practices,” available at www.esrb.org/ratings/principles_guidelines.jsp.

³ Information about the Council of Better Business Bureau’s Children’s Food and Beverage Advertising Initiative is available at www.cbbb.org/initiative/.

⁴ See The Advertising Industry’s Process of Voluntary Self-Regulation: Policies and Procedures, Part 2.2 (“filing a complaint”), available at www.nadreview.org/Procedures.asp?SessionID=.

⁵ *Id.* at Part 3.1.

⁶ *Id.* at Part. 3.7.

⁷ Information about the ERSP is available at www.narcpartners.org/ersp/.

⁸ Information about CARU is available at www.caru.org/.

One example of an enforcement action in which there was an ERSP referral is the Great American Products case, announced in 2005.⁹ Great American Products deceptively marketed pills and sprays they claimed would provide an array of anti-aging benefits. The FTC filed suit and defendants agreed to the entry of a federal court order requiring them to pay up to \$20 million in consumer redress. In announcing this case, our press released publicly identified the ERSP as the referring self-regulatory body.¹⁰

The Commission gives close review to all referrals from the BBB's programs, and all referrals are reviewed on a priority basis. We have told industry groups that ignoring the NAD, CARU, or ERSP process will enhance the risk of FTC review – something few companies want – and hope that this will foster utilization of the self-regulatory process before it reaches our level.

US/EU Safe Harbor Framework

A second example of an effective private/public partnership is the US/EU Safe Harbor framework on data transfers.¹¹ In the late 90s, the EU passed legislation restricting transfers of data to countries that did not have “adequate” privacy protection. At the time in the US, we did not have generally applicable federal privacy legislation. As a result, there was a real risk that the US privacy framework would be deemed “inadequate” and that data would not be able to flow between the EU and US. In the face of this risk, the U.S. business community and the federal government set out to develop a self-regulatory solution that would respect the EU's privacy legal framework, while continuing to allow cross-border data flow.

The resulting self-regulatory program, negotiated between the Department of Commerce, the FTC, other concerned U.S. agencies, and the EU, in consultation with industry and NGOs, grants safe harbor status to US companies that certify to the Commerce Department that they follow 7 specified principles of data security to ensure that they meet the EU's requirement of "adequacy" in data transfers.¹²

⁹ *FTC v. Great American Products, Inc., et al.*, Civil Act. No. 3:05-CV-00170-RV-MD (N.D. Fl. May 20, 2005), available at www.ftc.gov/os/caselist/0323247/0323247.shtm.

¹⁰ See *FTC Press Release, FTC Targets Bogus Anti-Aging Claims for Pills and Sprays Promising Human Growth Hormone Benefits: Settlement Provides Up To \$20 Million In Consumer Redress* (June 9, 2005), available at www.ftc.gov/opa/2005/06/greatamerican.shtm.

¹¹ See “Safe Harbor Overview,” available at www.export.gov/safeharbor/SH_Overview.asp.

¹² The Safe Harbor framework sets forth data protection principles in the following 7 areas: (1) notice, (2) choice, (3) onward transfer (transfers to third parties), (4) access, (5) security, (6) data integrity, and (7) enforcement. *Id.*

In order to meet their safe harbor obligations, certifying companies must have in place a dispute resolution system that will investigate and resolve individual complaints and disputes. They also must have procedures for verifying compliance. Dispute resolution bodies overseeing safe harbor participants must have the ability to impose severe enough sanctions to ensure compliance, they must publicize their findings of non-compliance, and they must have the ability to order the deletion of data in certain circumstances.¹³

To give the safe harbor framework its ultimate teeth, participating companies whose violations go unaddressed are subject to enforcement by the FTC or the Department of Transportation, as appropriate.¹⁴

Conclusion

Private/public partnerships have the potential to yield great gains for consumer welfare. The best of them involve a combination of self-regulatory measures with strong government oversight. It is likely that the development of effective self-regulatory schemes will work well in the area of product safety; we at the FTC stand ready to provide assistance as such programs emerge.

¹³ *Id.*

¹⁴ *Id.*