

1 accepting money for publishing, you'll understand why I
2 say it's hard to respect them in the morning.

3 The Commission's recently published weight loss
4 report concluded that false and misleading claims, such
5 as exaggerated weight loss without diet or exercise, are
6 widespread and are increasing and have increased in the
7 last decade. These ads promise what they cannot deliver
8 to a sometimes desperate audience. Commission law
9 enforcement action alone is not enough. We are here to
10 look for alternative approaches to reducing deceptive
11 claims in advertising for weight loss products and I look
12 forward to hearing the presentation of the panel this
13 afternoon. Thank you.

14 **INDUSTRY PANEL**

15 MS. RUSK: Thank you, Commissioner. We heard
16 the Chairman this morning and Commissioner Anthony just
17 now talk about how important it is to consider
18 alternative approaches to law enforcement, and our panel
19 this afternoon will be looking at what the industry can
20 do and I want to thank everybody who agreed to
21 participate. I know that all of you have initiated
22 efforts in some form or another to deal with this very
23 challenging problem and we want to hear what each of you
24 have to say. We may have to move at lightning speed this
25 afternoon. We have an ever shorter amount of time than

1 this morning's panel.

2 So, I'm going to jump right in and ask each of
3 you to introduce yourself in 30 to 60 seconds, tell us
4 your affiliation and what your interest in the weight
5 loss area is. Why don't I start with Brad.

6 MR. BEARNSON: My name is Brad Bearnson. I'm
7 General Counsel for Icon Health and Fitness. I'm
8 probably the interloper here in the sense that this panel
9 and workshop today didn't necessarily include initially
10 fitness equipment companies. But at our behest, the FTC
11 was gracious enough to give us a spot on here, primarily
12 out of our fear that the brush we develop here, we may
13 well be painted with here in the future. So, that was
14 our primary concern.

15 MR. CORDARO: My name is John Cordaro. I'm the
16 President and Chief Executive Officer of the Council for
17 Responsible Nutrition, which is a trade association of
18 approximately 85 manufacturers of dietary supplements,
19 some of who manufacture and market weight management
20 products. This has been an area of interest at CRN for
21 some time. Recently, we've initiated a working group
22 within CRN to develop overall guidelines for
23 substantiating claims, which would include weight loss,
24 and we've also had discussions with NAD about exploring
25 the possibility of a role for an outside third party

1 group to be of use in this area.

2 DR. GREENE: I'm Harry Greene, Medical Director
3 at Slim Fast Foods and I'm here representing the
4 Partnership for Healthy Weight Management.

5 MS. LEVINE: I'm Andrea Levine, Director of the
6 National Advertising Division, which is the advertising
7 industry's self-regulatory forum which was so glowingly
8 described by Commissioner Anthony. Thank you. I hope we
9 can live up to your accolades.

10 Our mission is to ensure that claims in
11 national advertising are truthful and accurate, a small
12 task, and I have a staff of five attorneys whom I do that
13 with and we have handled many cases in the diet product
14 area and are interested in, you know, what more help the
15 self-regulatory forum can be in resolving what are some
16 difficult advertising issues.

17 MR. MCGUFFIN: I'm Michael McGuffin, I'm
18 President of the American Herbal Products Association.
19 We're a trade association that represents about 200
20 companies, primarily marketers of herbal dietary
21 supplements, including some products that are promoted
22 for weight loss. I think my main interest in being here,
23 AHPA has years of experience in looking at self-
24 regulatory models for our trade, and we hope to be able
25 to offer some ideas in that regard for advertising weight

1 loss claims.

2 MS. MYERS: My name is Lisa Myers and I have
3 the privilege of serving as President of the Electronic
4 Retailing Association. My members are companies who use
5 the power of electronic media to sell things directly to
6 the public, and I have the distinction of having counted,
7 at some point in my membership, the companies that were
8 behind both of the shows that started our proceedings
9 this morning.

10 The vast majority of the members of ERA, and I
11 would venture to say all of the current ones, are quite
12 concerned about -- out of enlightened self-interest -- we
13 are a trade association, but out of enlightened self-
14 interest, we're very concerned about consumer confidence,
15 and therefore, we've taken a very aggressive role in
16 industry self-regulation since our formation in 1990.
17 And since the marketing of weight loss products and
18 fitness equipment is a major category, we have a keen
19 interest in the proceedings here today. Thank you.

20 MR. SECKMAN: I'm David Seckman, I'm the
21 Executive Director of the National Nutritional Foods
22 Association. We're a trade association that's been
23 around for 66 years now. We represent over 1,000
24 suppliers and distributors of dietary supplements and
25 over 4,000 retailers and we're interested in

1 participating today because we have a direct link with
2 the consumers through our retail stores.

3 MR. SHENDER: My name is Lou Shender. I'm the
4 Vice President and General Counsel of Jenny Craig. We
5 have an interest in these proceedings, obviously, as a
6 player in the area that advertises responsibly and has a
7 responsible program. It concerns us that others damage
8 both the industry and us unfairly with quick fix
9 solutions.

10 MS. RUSK: Thank you. I want to get very soon
11 to hearing from the panelists about the specifics of some
12 of their efforts to self-regulate, but first I want to
13 ask particularly the individual companies if they would
14 like to comment at all on their perception of the problem
15 in this industry and how it affects their companies and
16 the pressures that may come to bear on their own
17 marketing staff. So, if any of you would like to comment
18 on that subject area.

19 MR. BEARNSON: I think one of our concerns was
20 in the whole weight loss area, companies tend to take a
21 very expansive look at who their competitors are, and I
22 think we, as an exercise equipment company and primarily
23 a manufacturer of home exercise equipment company, view
24 ourselves as somewhat in the weight loss business, and
25 certainly there will be those within our company that

1 view our potential competitors as those in the
2 nutritional supplement and other, I guess, weight loss
3 means. And we've certainly had some concerns with some
4 of the claims that you see touted about and that we've
5 discussed here today, literally out of the concern that
6 we hope to legitimize the weight loss industry through
7 what we believe really ought to be lifestyle changes as
8 opposed to quick fixes or magic bullets that's been
9 referenced here today.

10 MS. RUSK: Anyone else?

11 MR. SHENDER: I mean, I guess I would generally
12 share that view. Earlier during the introduction it was
13 said that some of the responsible players are tempted to
14 act irresponsibly in light of the advertising that others
15 have. My experience is that that's not particularly
16 true. We do get questions from time to time from the
17 marketing department that might be bringing other
18 people's ads to notice in the legal department.

19 But on the whole, I think even the marketing
20 department, while they feel the pressure to market
21 aggressively do so responsibly. The concern, again, is
22 that there are legitimate players out in the marketplace,
23 including us, who might not have painless or what people
24 perceive to be painless solutions or quick fix solutions
25 or creams. And just out of our own self-interest, we

1 want to make sure that people understand they have to --
2 that the quick fixes just aren't going to work for them.

3 MS. RUSK: We've heard comment from some of the
4 associations and some of the companies that a lot of the
5 parties engaged in the more outrageous advertising are
6 not members of their association and we heard the
7 chairman talk about overseas operations and the
8 challenges that we face there, and I'd be interested, if
9 some of you have thoughts about who these parties are,
10 how they operate, and also whether any of your
11 associations or any of your companies have ever taken
12 action against someone that they felt was engaging in
13 deceptive advertising, either formally or informally.

14 MS. MYERS: Well, we have both formally and
15 informally. ERA, from its inception, again, worked on
16 the creation of formal guidelines that our members are
17 required to adhere to, that for the most part mirror what
18 the law requires already, although I have to confess that
19 in a couple of instances, in recent guidelines, notably
20 those in the advanced consent marketing area, what you
21 guys have been calling negative option, we slightly
22 exceed what the law requires in order to anticipate
23 problems that consumers will have. Our members are
24 required to certify that they'll abide by the guidelines
25 when they join ERA, and if -- in the case of shows that

1 they produce, like the shows that you saw this morning,
2 they're required to individually certify that the shows
3 meet the ERA guidelines.

4 If a member has certified a show or a non-
5 member chooses to certify their show and we get a
6 complaint about the show, that it is violating the
7 guidelines, we have an outstanding review board comprised
8 of five individuals, one of whom is Mary Esquenaga who
9 served 13 years at the Federal Trade Commission; Wally
10 O'Brien who worked with NAD is a member of our review
11 board, and so forth.

12 And if we get a complaint on a show and it
13 looks like it may be outside of the guidelines or
14 violating them, if it's a certified show, we'll then take
15 the show to NAD and NAD will institute a formal review of
16 the program. And if they find that the program is in
17 violation or is making unfair claims or claims that they
18 can't substantiate, our members have an opportunity to
19 either pull the show and correct it or pull the show
20 permanently or do none of the above, and if they do none
21 of the above, ERA will go along with NAD and will file a
22 complaint with the Federal Trade Commission.

23 We've looked at 28 shows produced by members.
24 I'm still employed, although I check that paycheck every
25 week. We look at members' shows as well as non-members'

1 shows and members who fail to come into compliance are --
2 we don't welcome their membership or their support, even
3 though for a small association it hurts some days to turn
4 away the cash that would otherwise be available to us, we
5 don't take it.

6 I think NAD does a marvelous job and I told
7 Andrea that I was going to say that. I think they need
8 more funding both from the private sector and the
9 government sector because there are three big problems
10 with what we're doing now. One of them is that it takes
11 an awful lot of time in a very fast-moving industry to
12 consider and allow for the fair due process. The second
13 problem is that it's enormously expensive to prepare the
14 kind of briefs that are required to really fairly look at
15 a show, and the third problem that I face is that our
16 approach, heretofore, because of those two reasons, has
17 been pretty opportunistic. We hit those shows that are
18 really the outliers.

19 MS. RUSK: Lisa, can you give us a sense, in
20 the times that you have gone through this process, how
21 long does it take and what kind of response do you get at
22 the end of it?

23 MS. MYERS: Literally, we had one show that has
24 been mentioned several times in this room today, we first
25 prepared a complaint to NAD, our time line was about 10

1 weeks internally. We then went to NAD and we discovered
2 that the show was being looked at by a District Attorney
3 in a particular part of the country and because it was
4 under active investigation in a particular district, NAD
5 chose not to look at the show. By the time a final
6 consent decree was signed, a period of almost between
7 two-and-a-half and three years had gone by, and in an
8 industry that is direct response, that's a long time for
9 the activity to go on.

10 So, it's an imperfect world, but we are looking
11 forward to -- we've created a task force to bring the ERA
12 Program to the next level. We're looking at ideas. My
13 members are not -- I'm not speaking for all of them yet,
14 we're looking at it. But I think we're going to move
15 toward the hiring of a full-time ombudsman who will still
16 not see everything but will less opportunistically, more
17 routinely, review all of the advertisements that my
18 members produce, and we're going to bring some method to
19 the process, looking at those shows that are airing with
20 the greatest frequency, that are hitting the greatest
21 number of consumers, as opposed to waiting for a
22 complaint to come in. It's an imperfect process, but I'm
23 really proud of the industry for trying.

24 MS. RUSK: We've moved on to my next subject,
25 which is fine, which is what is going on with each of the

1 panelists' associations or companies internally to deal
2 with this problem, and I do want to sort of focus on
3 that, I think, first, and then talk about the NAD model
4 with an external review process, and I know that AHPA has
5 initiated an effort to come up with guidelines and I know
6 each of you have been engaging in different approaches to
7 this.

8 So, I'm going to ask Michael, I think, to talk
9 about his efforts since that is well underway and I'd
10 also be interested in hearing from you candidly about
11 what some of the challenges are in the process.

12 MR. MCGUFFIN: Okay. I found it interesting to
13 hear Commissioner Anthony state that Commission law
14 enforcement and the law is not enough. I think we all
15 know that. I think that's why we're here today, as the
16 press release that announced this hearing stated, that
17 we're here to explore alternative approaches to reducing
18 deceptive claims in advertising weight loss products and
19 to explore new approaches for fighting the proliferation
20 of misleading claims.

21 We've been in this conversation with the
22 Federal Trade Commission for several months. We've met
23 with Rich Cleland and Michelle on a number of occasions
24 just to talk about concerns that we have about
25 advertising of weight loss products specifically, and an

1 idea was generated that we should look to an industry
2 standard guidelines for advertising weight loss products.

3 Our observation was that the Commission was
4 very receptive to that idea and we're really trying to
5 stay focused on just dietary supplements. That's who we
6 represent, that's what our member companies sell.

7 What we found was that this document already
8 exists. As Dr. Greene mentioned, Partnership for Healthy
9 Weight Management -- and this is in everybody's handout,
10 I guess, when you came in -- produced this voluntary
11 guidelines for providers of weight loss products or
12 services in February of 1999 and we've used this as the
13 starting point for our conversation. It's a good
14 document, but in spite of the fact that it says products
15 here, it's almost exclusively for weight loss services;
16 for clinics, yes, the products that are sold at those
17 clinics, but it's not for stand-alone dietary
18 supplements.

19 So, with this is our starting point, we just
20 came up with an initial draft pulling pieces out of this
21 and started to distribute that to about a dozen AHPA
22 member companies who had expressed an interest in being
23 involved in this process either because they sell these
24 kinds of products or they represent companies that do in
25 some capacity or another.

1 Where we've found -- I don't want to spend too
2 much time, although I do want to give just a little kind
3 of overview and a few details. We've ended up with a
4 draft that is composed of four sections, things that you
5 should always say in your advertising for weight loss
6 products, what are the messages that must be in that ad?
7 Conversely, what you should not say in any weight loss
8 ad, what kind of statements should never be in a weight
9 loss ad.

10 We also came up with some ideas about
11 information that should be in advertising if it's not on
12 the label. That was the third group. And then we came
13 up with additional optional information that you might
14 consider including. And this was kind of a natural
15 process. We didn't start with the idea that we should
16 come up with these four divisions, we just started
17 talking to each other and that's what we arrived at.

18 We also ended up thinking that it was important
19 to add a section that would repeat some of the current
20 FTC regulations about endorsements and testimonials
21 because we know that that's a really -- you know, it's
22 something that's often used in the advertising of these
23 products and we shouldn't ignore it.

24 I do want to talk about some of the specifics
25 and I want to be cautious. This is very much a work in

1 progress. Nothing here is fixed. But I do feel
2 comfortable in sharing some of the ideas, but you really
3 need to hear them as ideas. These are some of the ideas
4 that have been presented about what kind of information
5 must be included in the advertising of weight loss
6 products.

7 Identification of the ingredients. Now, that's
8 not required by Federal law, but there's a sense that if
9 what we're really talking about is addressing the needs
10 of the consumer and they've already used a product that
11 contains pick an ingredient and they didn't like it or it
12 didn't work for them, then the best way to protect that
13 consumer before they buy another product is to let them
14 know that it's the same ingredient so that they can make
15 that decision in a much more informed manner. Again,
16 this was just an idea.

17 We've also had a few people -- one comment that
18 came back said, well, let's focus just on the primary
19 ingredients, we don't want to have to repeat the label on
20 the advertising. That's not the place where the consumer
21 needs to find that. They need to find that on the
22 package of the goods. And there's also -- there are some
23 companies who believe this should not be required in
24 advertising, that are very protective of the very few
25 square inches that they've got on that page.

1 An idea that there should be a statement that a
2 product be used as part of a program that includes a
3 healthy diet and sufficient exercise. Again, though with
4 a concern that that be stated in context of what's
5 actually known about that product. And it was
6 interesting, one party said that they were concerned that
7 companies would abuse that by saying eat one bag of
8 Fritos and do three hours of exercise a day and I
9 guarantee you, those Fritos will help you lose weight.
10 So, there was some caution about that, you can't just say
11 and diet and exercise and assume that that will fix that
12 communication.

13 Some comments about making sure that you follow
14 the label claim, that you don't take more than is
15 recommended. There were a few other points, but I think
16 those were the main ones.

17 With regard to statements that should not be
18 included, we talked a lot about safety and we started
19 with an idea that you shouldn't just say 100 percent
20 safe. But there were a lot of ideas about how you would
21 word that in terms of the labeling of the product used in
22 -- according to the directions for use, reference to
23 appropriate labels on the package without needing to
24 repeat whatever cautionary statement in the advertising.

25 FDA approved should never be on the

1 advertisement of any dietary supplement. To the best of
2 my knowledge, there's no FDA approval for a claim for a
3 dietary supplement and it shouldn't be on those
4 advertisings. There was a suggestion that maybe before
5 and after pictures should be advised not to be used. Any
6 statement that implies rapid, speedy or quick results.

7 Maybe let me wrap this up, but you get the
8 ideas. What we've talked about is just kind of
9 brainstorming. We're really at an early phase. And I
10 want to go back to here's the model. This first word
11 here is partnership and this first word here is voluntary
12 and I think we really -- we want to borrow from this
13 model in the same way that the Commission can't do it
14 alone, the industry can't do it alone. We kind of need
15 the same intention of this group where academicians and
16 scientists and health care professionals, organizations
17 promoting the public interest can find a forum where we
18 can get together and hash this out and come up with a
19 document that provides guidance, not only for industry,
20 people that are putting advertising out into the media,
21 but also to the media.

22 I am going back to Commissioner Anthony's
23 statement. The Commission can't do it alone, the
24 industry can't do it alone. If the media is willing to
25 run these ads -- I've brought some examples here of just

1 things that I've picked up in the last couple of weeks.
2 I don't want to spend too much time --

3 MS. RUSK: Michael, before you get to that, I
4 want to ask you on your list of claims to be avoided
5 whether having sat through this morning and the effort
6 this morning to come up with a list that people generally
7 feel are scientifically not feasible for any weight loss
8 product, whether you have a sense from going through this
9 process and having discussions with your members about
10 whether they would be amenable to incorporating a short
11 list like that into your guidelines.

12 MR. MCGUFFIN: I took copious notes this
13 morning. One of the ideas that had been presented
14 earlier was any statement that implies that weight loss
15 will be long-lasting. That's something we've already
16 talked about. Any exaggerated or unsupported claim for
17 which there's insufficient substantiation. I mean, that,
18 in a sense, is just repeating the law. The law already
19 says that. But, again, I took notes seriously. I think
20 there are -- it's a challenge to this group to look at
21 those weight points that were identified by the first
22 panel and determine what do we want to do with those. I
23 think they do all need to be addressed.

24 MS. RUSK: So, you think you're at least
25 receptive to the idea of working with that concept of a

1 list of -- okay.

2 MS. MYERS: For the record, I'm not sure we
3 are.

4 MS. RUSK: Okay. You want to give us your
5 thoughts on why you don't think that would be workable?

6 MS. MYERS: We feel very strongly that you have
7 to look at each particular advertisement on a case-by-
8 case basis and you have to look at the context in which a
9 reference to the principles that were made this morning,
10 if you look at the context in which those claims are
11 made.

12 I'm not a scientist and I'm not an attorney and
13 I'm not a nutritionist, so I have the unique position of
14 not being very expert in any of this. But as a non-
15 expert consumer sitting in the audience, I heard on the
16 panel this morning a great deal of ambiguity. The votes
17 were clear, nobody broke the pack and said anything other
18 than no, no, no, no, no. But as I heard the discussions,
19 I heard a great deal of ambiguity around the topics being
20 discussed.

21 So, we don't oppose the principles, but we feel
22 that it's important that advertisements continue to be
23 looked at on a case-by-case basis with the claims in the
24 context in which they're made.

25 MS. RUSK: Do you think that whether you agree

1 with whether the list this morning was obvious enough,
2 that there are certain types of claims that are just so
3 outrageous that it should be possible to come up with
4 some examples that we could agree without having to get
5 into substantiation review, without having to engage in
6 ad interpretation, they're just not plausible, we can all
7 agree to avoid the claims?

8 MS. MYERS: When you see an egregious outlier,
9 I think it is self-evident that it's really bad. When we
10 saw -- I don't think anybody in the room looked at the
11 two shows this morning and said, well, those claims could
12 be true. I think we had that same reaction. But when
13 you look at the principles, the eight claims in
14 isolation, with the possible exception -- the probable
15 exception of the one claim in which the claim is made
16 that you can lose weight without diet and exercise, I
17 think that case was pretty unanimously made. But I could
18 see a context in which each of the other claims could be
19 made with appropriate disclaimers and --

20 MS. RUSK: So, a claim of permanent weight
21 loss, given the discussion this morning, you think
22 that --

23 MS. MYERS: I'm not a scientist, but I heard
24 panelists on the panel this morning make the point that
25 if you continued -- as long as you continued to ingest a

1 particular thing, that it was permanent in that context.
2 So, if you said, it's permanent as long as you keep doing
3 it, that's a context question. So, it's a permanent
4 claim with a qualifier. I'm not sure, I'm not an expert.
5 But I think that we fear, in the emerging science, that
6 issues do need to be looked at on a case-by-case basis.

7 MS. RUSK: Do other people have reactions to
8 the idea that there is a category of claims that are so
9 clear both on the science and how they're presented in
10 advertising that there could be general agreement that
11 these are claims that everyone ought to be avoiding in
12 advertising? I wonder if anybody has a view different
13 from Lisa's on this or the same or --

14 MR. CORDARO: My immediate reaction is that the
15 answer is yes, the other part of me says, with those
16 kinds of claims, how can anyone be so gullible. Probably
17 everyone in this room gets e-mails from people from all
18 parts of the country saying they have \$30 million that
19 they have access to, but for some reason, they only need
20 a few thousand dollars to help them break it loose, and
21 if I'll send them those few thousand dollars, they will
22 gladly share 20 or 30 percent of that \$30 million with
23 me.

24 I read that and I delete it or sometimes I'll
25 send it to a friend and say, hey, I finally found a way

1 to deal with the problems with the stock market, you
2 know, here's a quick way to make some money. But, you
3 know, then you have a little fun and you delete it and
4 you say, how could anyone possibly respond to that. It's
5 the same way I feel about many of the ads that I see for
6 weight loss management. And part of that is because I do
7 know a little something about weight management and I do
8 know something about the human psyche and I do know
9 something about regulations and I do know something about
10 dietary supplements, and I think that Michelle, what
11 you've generated and what you've started here and I
12 congratulate my colleague, Michael McGuffin, for the
13 advance work that's been done in developing some
14 guidelines that could be useful throughout the dietary
15 supplement industry.

16 I think, though, that what we need to do is to
17 focus on the fact that AHPA can't do it alone, AHPA can't
18 do it with CRN and NNFA and all the other associations
19 because we operate with -- in a regulatory environment,
20 in a media environment, we operate with the public
21 looking for all sorts of quick fixes, whether it's money,
22 whether it's sex, whether it's food or whatever it is.

23 So, I think that two of the words that Michael
24 used I'd like for us not to lose sight of them.
25 Partnership. We have to have a partnership between the

1 regulators, between the industry and between the media,
2 and we have to realize that our common goal is to protect
3 the consumers.

4 Secondly is that we're going to have to
5 recognize as resource-challenged as the regulators might
6 be, the answer to that is not to say, industry, you self-
7 regulate. Self-regulation only goes so far. A very
8 vigorous, focused, regulatory arena, using third party
9 and a strong self-regulating industry is the best that we
10 can expect and it's not going to solve all problems, but
11 I think it's going to solve a heck of a lot more.

12 MS. RUSK: I won't disagree that it sometimes
13 seems amazing that consumers will purchase some of the
14 products that are advertised, but certainly from our
15 investigations, we see that the sales tend to be enormous
16 and the more outrageous the claims, sometimes the better
17 the sales. I think we understand that consumer education
18 is an important element to this, too, and that the claims
19 we talked about this morning may be useful, also, for
20 consumer education efforts. But I do want to see if
21 there's a way to build on that idea for the industry part
22 of this effort, and I also agree with you and Michael
23 that partnership is an important part of that.

24 I guess I'd like to turn to Dr. Greene since
25 the Partnership is coming up and you're a member of that

1 partnership, about how that model worked and how the
2 guidelines for the partnership were developed.

3 DR. GREENE: Let me just say a word, if I
4 might, about Lisa's comment since I was a member of the
5 session this morning that said no, no, no so many times.
6 We were asked to look at that from a scientific basis
7 upon using these eight characteristics in an unqualified
8 state, and if you unqualify that, then you have to say no
9 on every one of those accounts.

10 So, what I think we wanted to come up with from
11 the media standpoint is, if you see one of these ads that
12 state that, in the unqualified state, we have to say this
13 is not possible or this should not be allowed. So, I
14 just wanted to make that first.

15 Second, to say a word about the partnership,
16 since you brought that up, I think some of you don't have
17 the yellow book that has all of the guidelines in it.
18 Let me just say that the mission of the partnership was
19 to promote sound guidance to the general public on
20 strategies for achieving and maintaining healthy weight
21 and that there are 11 principles that were decided upon.
22 I thought maybe it would be worthwhile just to say a
23 couple of them, if I might, maybe five of them.

24 The first principle is to promote healthy
25 eating and physical activity. This was a component, as I

1 think all would agree, of healthy weight. That obesity
2 is a chronic disease that shortens life and increases
3 morbidity. Thirdly, that excess weight is caused by the
4 interaction of genetic, environmental and behavioral
5 components. Four, that modest weight loss can improve
6 health of the consumers. And fifthly, that consumers are
7 entitled to accurate, non-deceptive information about
8 weight loss.

9 Now, there are six others that I don't have
10 listed here, but these encompass the main ones and I
11 encourage you to get a copy of the guidelines that are
12 listed in this and go through each of those because we
13 spent a considerable amount of time developing those and
14 using those as principles upon which to develop our
15 agreements.

16 Now, as a component of that yellow book, I've
17 taken the four primary agreements and tried to pull those
18 down into something that's brief, also, and the first is
19 to educate the public about the risks of being
20 overweight. Second, to educate the public about the
21 benefits of weight loss. Thirdly, to provide consumers
22 about the risk of weight loss from various products or
23 programs so that there is some risk associated with
24 weight loss, particularly if it's not done in a healthy
25 way. Four, to provide consumers about the expectations

1 of products or programs based on clinical trials. And
2 that was the most important part and this was the major
3 function, I think, of this morning's session, to make
4 sure that there is some clinical data associated with the
5 claims.

6 So, those were the primary principles, the
7 agreements and the mission of the partnership, and I
8 think I can say, without reservation, that those of us
9 who are members of the partnership would be quite pleased
10 to have other members, to expand the membership to
11 include these groups around the table because I have to
12 tell you, I'm surprised at some of the things that have
13 already been instituted, particularly, Lisa, I had no
14 idea and I applaud you for doing what you're doing and we
15 would be very pleased to have the growth of the
16 membership to have these voluntary guidelines or self-
17 regulations put within a larger context.

18 Secondly, one of the biggest problems we've had
19 with the partnership is how do we keep it going and how
20 do we put a little bit more teeth and observations into
21 it, and one of those is a lack of having funding. This
22 is the same problem that Andrea is going to talk about
23 with the NAD. We really need funding, as most of us do,
24 to try and help make this become a greater reality. And
25 I spoke with members of IFIC and there is a possibility

1 of having IFIC involved from the standpoint of helping to
2 monitor funds that could be distributed in a way that the
3 partnership would like to utilize these funds to really
4 better achieve the overall goals and the principles as
5 have been outlined.

6 So, in doing that, I have three
7 recommendations. One, to use the framework of the
8 partnership to expand it into a better self-regulatory
9 mechanism. Secondly, to use the partnership, possibly,
10 and this would require a lot of discussion, possibly, as
11 a certification mechanism, and finally, to possibly use
12 the IFIC Foundation as a mechanism to establish a better
13 defined group that could go forward with the first two
14 components. IFIC has not said that they would do it, but
15 they would entertain discussion about it.

16 MS. RUSK: Dr. Greene, I'm sorry, did you --
17 for people who don't know, did you mention who IFIC is?

18 DR. GREENE: IFIC is International Food
19 Information Council. It's comprised of a membership of
20 industry that is related to food, and it's supported by
21 the food industry as such. So, it's an educational
22 organization worldwide that deals with food and health.

23 MS. RUSK: So, I take it from your response to
24 Lisa that you could envision as part of the partnership
25 guidelines incorporating a list like we talked about this

1 morning as a piece of an advertising code or guideline.

2 DR. GREENE: I think that that could work in
3 the same way that we have developed the partnership
4 guidelines, that there could be a way to do that in a
5 well-organized way. This would, as Lisa is nodding her
6 head, require a great deal of discussion and time to make
7 it happen. But I think it could happen.

8 MS. RUSK: John, I know that CRN has general
9 codes that relate to advertising and the conduct of their
10 members, and I know, also, that just last week, you put
11 out a piece about sports supplements for young athletes
12 that took an approach of sort of red light, green light,
13 yellow light, and I wondered if you could comment on that
14 piece as a possible model for the weight loss industry.
15 I know that dealt more with safety than with truthful
16 claims. But I wondered if you could sort of tell us what
17 that was and how it came to be and sort of what response
18 you've gotten.

19 MR. CORDARO: Sure, I'd be happy to. I'll
20 touch on the first point. As a part of our overall code
21 of ethics, we do address, in general terms, issues
22 dealing with product quality, product formulation,
23 advertising, substantiation. But quite frankly, we are
24 not a police force of our members. We deal with problems
25 only if they are brought to the attention -- brought to

1 my attention and then I have to investigate. So, I don't
2 have the same set of activities that Lisa seems to have
3 in terms of actually looking to see what's there. So, in
4 that sense, we really don't have a lot of teeth in terms
5 of policy, what's going on with our members.

6 But on the second issue, I think that what
7 Michelle is referring to is probably more by way of an
8 example of a model that could be considered. We were
9 very concerned with issues that were being raised about
10 whether youth under the age of 18 should be using any
11 kind of dietary supplement or sports supplement products.
12 So, we concluded that it was, quite frankly, in the best
13 interest of consumers and the best interest of industry
14 if we were able to draw a line someplace and to
15 demonstrate that based upon sound science, that there
16 were good reasons for supplements to be used, there were
17 good reasons for certain sports nutrition products not to
18 be used, and that we needed to find some credible way to
19 develop that information and to present it to the public.

20 We were fortunate to be able to have a
21 conference jointly sponsored by the Office of Dietary
22 Supplements at NIH and we pulled together representatives
23 from a number of what we call the gatekeeper
24 organizations and scientists and let them review draft
25 guidelines that we had prepared back in January of this

1 year. Then we spent what seemed to be an endless amount
2 of time reworking comments and tweaking the guidelines
3 and finally were able to get it to a point where we
4 believe that it had met the goals that we had established
5 and we were able to release those just in the last few
6 days.

7 Again, I would -- you know, truth in
8 advertising -- say that the guidelines themselves are not
9 the end, but simply the beginning of the story, that the
10 ability of these guidelines to be successful will be
11 whether the gatekeepers will actually be able to get
12 their hands on the guidelines. We're willing to make
13 them available. Whether they will share them with young
14 athletes. But, again, with young athletes, we're dealing
15 with a similar problem when we talk about weight
16 management in older people.

17 We've developed such a culture in this country
18 about winning at the earliest age and sometimes at
19 whatever the cost, that sometimes when I talk to parents
20 -- I'm involved in a lot of youth sports. When I talk to
21 parents about the fact that their son or their daughter
22 is not a Chamique Holdsclaw or a Michael Jordan or
23 something and they ought to let him or her have fun, they
24 don't want to deal with me. They want to know what
25 should they be using, what training should they be

1 taking, what camps should they go to.

2 So, I say this because I think, again, we have
3 to put these kinds of efforts into context, and I think
4 that they actually will have more value and more use as
5 we get more attention to it and as we start to get more
6 support from the various sports organizations.

7 MS. RUSK: And, John, I know that piece is, to
8 a large extent, targeted to the athletes and the coaches
9 and the parents. Can you tell us about your members and
10 their involvement in terms of are they willing to adopt
11 those in terms of how they market their products?

12 MR. CORDARO: Our members have adopted them.
13 For example, they will not market or advertise products
14 that are in the yellow light or the red light category to
15 anyone under the age of 18, as an example. Products that
16 are in the green light category are products that are
17 normal nutritional products, whether they're simple
18 liquid products or dietary supplement products that
19 should be used for normal reasons and at acceptable
20 levels.

21 MS. RUSK: And I know these are new, these
22 guidelines, but do you have a sense of how -- do you
23 expect all of your members to adhere to them or is there
24 dissension in the ranks?

25 MR. CORDARO: Well, speaking today, I would say

1 that I do expect all of them to adhere to it. They were
2 all supportive of it. We will be distributing them to
3 Congress. We'll make an initial distribution shortly,
4 but we'll wait for the new Congress to make a more
5 extensive distribution. We know that there are some
6 members of Congress that have a significant interest in
7 dietary supplements in general and specifically sports
8 nutrition products. So, it will be interesting to see
9 how useful these might turn out to be in the legislative
10 arena.

11 We also had a great deal of interest from
12 several of the governing bodies of sports organizations.
13 Some of them, quite frankly, initially were very
14 skeptical about the industry getting in and doing
15 something about this, and I think that to a large extent,
16 the reason it took us almost a year to move from draft
17 and discussion to reaching closure was to build that
18 level of credibility.

19 MS. RUSK: Is that concept of sort of traffic-
20 like categories with maybe the list from this morning
21 being a red light category something that people think
22 could be a model? And maybe we'd disagree about how many
23 claims fall in the yellow light category. But there may
24 be -- I think that that was the goal, at least, of this
25 morning's panel, was to figure out where that red light

1 zone is and . . .

2 MR. SHENDER: We would strongly endorse that
3 approach as a member of the industry who, I think, all of
4 our representations would be green light. It's
5 interesting to me to hear sort of the concerns that have
6 been expressed a little bit about this morning's
7 discussion.

8 MS. MYERS: I just have to clarify because I do
9 not want to be the poster child for the anti -- I'm such
10 a fan of what you are doing and what you have done and I
11 love the study. But just as an example of the context
12 issue that I was trying to express, one of the ads that's
13 in the report has a claim, lose five, six, even seven
14 pounds of fat a day. Well, clearly, I don't think
15 anybody in the room would -- clearly, there may be a
16 consumer who responded to that by buying the product, but
17 I don't think any of us would find that not egregious.

18 But in the discussion around Claim 8, Claim 8
19 was that consumers who use this product -- would this be
20 a fair claim? Consumers who use this product can safely
21 lose up to three pounds per week for up to eight weeks?
22 Well, three pounds per week up to eight weeks is 24
23 pounds of weight loss. Now, by the end of that
24 discussion, I believe that it was generally agreed by the
25 panel that one-half to 1 percent of body weight or one-

1 half to one pound a week would be in the safety zone for
2 weight loss, all else being equal, under supervised
3 conditions. But the opening speaker who addressed that
4 claim made the statement that in the first two weeks, it
5 might be reasonable to lose three pounds per week and
6 then two pounds a week thereafter, and that's 18 to 20
7 pounds. So, it's in the context.

8 MS. RUSK: I understand. You're saying that on
9 certain specific claims this morning there was more
10 discussion than on others --

11 MS. MYERS: Yeah.

12 MS. RUSK: -- and we may sort of not be in full
13 agreement about the exact list, but I'm trying to sort of
14 get at the more general idea and I --

15 MR. CORDARO: Michelle, let me just --

16 MS. RUSK: -- want to make sure that we have
17 time to talk about the NAD model because we've heard so
18 much reference to it and I think it's a very promising
19 concept.

20 MR. CORDARO: Can I just quickly touch on --

21 MS. RUSK: So, I'll hear from John. I'd also
22 like to hear from David Seckman.

23 MR. CORDARO: I think that if you add -- I
24 think I'm in agreement with the philosophy of what you're
25 trying to do. But as a way of dealing with the specific

1 issue that Lisa's raised, if we could get some closure on
2 what the guidelines or criteria would be for making those
3 yes/no decisions, then I think that the concept would
4 flow more easily.

5 Lisa, do you agree?

6 MS. MYERS: Yes, sir, I do.

7 MR. CORDARO: Okay.

8 MS. RUSK: David, we haven't heard from NNFA
9 and I know that you also -- your association has some
10 programs for how your members market their products.

11 MR. SECKMAN: We do have guidelines for that,
12 as well. We have a code of ethics that our members have
13 to sign on an annual basis about what they do and don't
14 agree to. And since half the supplements that are sold
15 in the country are sold in retailers, at the retail
16 stores, we think it's very important to be able to
17 educate them. Like the other trade associations, AHPA
18 and CRN, we advise our members and have strong policies
19 and continually remind them of what our policies are as
20 an association about selling products to minors and what
21 the restrictions should be sold. So, we constantly go
22 ahead and do that.

23 Also, since we're in contact with so many
24 consumers on a daily basis, what we've come up with and
25 developed is a what-you-need-to-know series, which is

1 simply a very simple pamphlet that's located near the
2 check-out counter of each of the retail stores and cash
3 registers and what we do is we're in the process -- we've
4 developed pamphlets on organics, a what-you-need-to-know
5 series on organics and on specific products like kava and
6 is the industry regulated. And we're in the process of
7 developing one on weight products itself. So, we will
8 have that out there and available, as well.

9 One of the things that we have, and I know
10 we're going to talk about this in a second, Michelle, but
11 we've contacted NAD, as well, and looked at that model to
12 see how it can be incorporated within our membership
13 requirements within the association. We have several
14 quality assurance programs that require our supplier
15 members, that when they join the association, they have
16 to meet those requirements, and if they cannot meet those
17 requirements, then they are expelled from membership from
18 the association.

19 So, just on a separate comment is that I think
20 we're very much in favor of the development of what
21 you're talking about here, the examples and the
22 guidelines that have been discussed here this morning.
23 We'd like to see that progress and be published as soon
24 as possible.

25 MS. RUSK: Thank you. I'd like to really turn

1 now, I think, to hearing more about the NAD model as a
2 model of a third party that could, I think, take some of
3 the burden off the industry trade associations with sort
4 of assessing the claims and, Andy, I'd really like to
5 give you some time to sort of explain how that model
6 operates and sort of how it might work in the weight loss
7 area and, also, what challenges you see to making it work
8 well in the weight loss area.

9 MS. LEVINE: Right. Take the load off them,
10 put the load on us.

11 MS. RUSK: Right.

12 MS. LEVINE: Put the load on me. NAD is a very
13 different model than the regulatory world. In fact, we
14 have meetings with companies who are new to this system
15 and the first thing I say is, you're not at the Federal
16 Trade Commission. This is a very different place, and
17 everybody breathes a sigh of relief and takes their
18 jackets off.

19 Our system is designed and intended to ensure
20 truthfulness and accuracy in advertising. That's
21 supposed to benefit a wide range of players. Competitors
22 who will have a level playing field to play on.
23 Consumers who can have confidence in advertising and,
24 therefore, make good choices for themselves. And
25 advertisers, because if consumers have more confidence

1 that your claims are truthful, your advertising is more
2 powerful. And by the way, the government does benefit a
3 bit because we take some of the load off them by dealing
4 with a lot of these advertising issues in the self-
5 regulatory system.

6 It is not a system that's designed to punish.
7 It's not a system that's designed to ferret out has
8 someone broken the law, has someone engaged in deception,
9 has the public been deceived. It's really about looking
10 at every individual advertisement that is challenged and
11 brought before us and assessing what is the message that
12 this ad conveys to a reasonable consumer. You know,
13 seeing this ad over here, what expectations might I have.

14 And, you know, I do understand in the weight
15 loss category there's a lot of talk about people are
16 gullible. But the law does require that when you make an
17 objective claim, and a claim that I lost 44 pounds in 30
18 days is an objective claim, that you have to be able to
19 provide support for the claim, substantiation for the
20 claim. So, what we're looking for is what's the message
21 conveyed by a particular advertisement, what's the
22 substantiation that the advertiser has for that claim and
23 is there a good fit between them.

24 And in doing that, it is a very simple process.
25 A challenger can come in with a complaint that just

1 basically criticizes certain advertising, questions
2 whether there's support. To the extent that that
3 challenger has evidence disproving the claims, they can
4 submit that. The advertiser is notified, invited to
5 participate. It is a voluntary system. Amazingly,
6 amazingly, 95 to 98 percent of the companies we contact
7 come in and participate voluntarily in the system. They
8 submit their substantiation. There's one more round of
9 exchange of evidence.

10 And then the NAD sits down with each side and
11 basically talks about, you know, what are you trying to
12 say here, what's the message here, do you think maybe it
13 could be more broadly understood, and does your
14 substantiation support the claim. What you claim about
15 your products is what drives what kind of support you
16 need.

17 So, if you claim clinical studies prove, then
18 you need a very high level of support. If you say, you
19 know, we are seeing some scientific indications of some
20 positive direction in this -- you know, it depends on
21 what it is you claim, what it is you have to have as
22 support.

23 My staff of attorneys then review all the
24 substantiation. We use the experts on each side to help
25 us critique the scientific experts and thanks to our

1 president, Jim Guthrie, we now have a little funding for
2 outside experts, so we'll be able to even go outside our
3 circle and expand our expertise. But the attorneys
4 essentially assess both parties' positions. They write a
5 very detailed decision that describes both the legal
6 positions and the evidence submitted by both parties, and
7 then they analyze it and they decide whether or not they
8 think the claims were supported, whether or not they
9 think the claims, perhaps, need to be modified or whether
10 some claims, simply, aren't supportable and should be
11 discontinued.

12 The decision is made public, it is published.
13 Therefore, you know, not only do the parties have their
14 issues resolved for them, but, also, the public has an
15 opportunity to learn about what our thinking was, and
16 more importantly now, over 30 years, we've built up an
17 archive of decisions that now are accessible through an
18 electronic subscription system so people can actually do
19 research and see, when I want to make this kind of claim,
20 what kind of evidence has NAD found was sufficient to
21 support the claim. So, we view it as a educational, non-
22 punitive process.

23 At the end of the day, do we try to get to the
24 same place that the FTC gets to in a slightly different
25 way? Yes, truthful and accurate advertising. I mean,

1 that's the goal. But it is, I like to think, kinder and
2 gentler methodology, and most people who participate in
3 the system, once they have used it, you know, become real
4 converts to the system.

5 You know, I came in from law enforcement and I
6 thought, without subpoena power, without any power, how
7 are you going to compel anybody to come and give you
8 anything, show you a piece of evidence, and I'm stunned
9 by how effective the system is, and I think historically
10 it's been effective with a different group of players
11 than we have here today and who have become confident
12 that the system is fair, that the system is even-handed
13 and that it's not an abusive process, and who routinely
14 watch one another carefully and challenge one another's
15 claims the minute they think there's a problem with what
16 a competitor is saying and effectively use the forum to
17 level the playing field.

18 I think in the area of weight loss, you know,
19 most of our experience has been, if not all, monitoring
20 cases. We are empowered to go out and monitor and review
21 advertising claims. But as I said before, we have five
22 staff attorneys, so it's a Herculean effort to be in
23 charge of all national advertising. We might miss a few.
24 So, we don't get to everything all the time. And
25 unfortunately, in the weight loss category, we really

1 haven't had the benefit of competitors, you know, really
2 watching one another, and I think that to the extent in
3 this audience today there are a lot of players who have a
4 lot of pride in their products and their systems and make
5 very careful and truthful and accurate claims about them,
6 that it is incumbent on them to begin to challenge the
7 claims of those who are less careful and less honest in
8 their representations as to what people can expect from
9 their products.

10 The one other thing here -- well, two other
11 things. Talking about industry codes. I mean, NAD is
12 not bound by the law, the Supreme Court, the FTC. We can
13 do whatever we want, but we don't because we're
14 realistic, pragmatic people and we want to function in
15 the real world. So, we try very hard to harmonize our
16 decisions and our application of the law and our
17 definition of terms to FTC codes, to industry guides, so
18 that we can kind of harmonize our self-regulatory world
19 with the regulatory world and with the self-regulatory
20 efforts of lots of other organizations. So, I think that
21 kind of a partnership together has a lot of potential
22 here.

23 The one other piece, and I know we're going to
24 talk about the media later today and I understand the
25 media's reluctance to screen in advertising because as

1 someone who does it, it's really hard and it can be very
2 time-consuming. But I do think that maybe if we could
3 somehow expand the circle of support for the self-
4 regulatory system to include the media, after the process
5 has run its course, if industry could take it on, much
6 like the ERA model, to try and police itself a little bit
7 better and find the problematic advertising and bring it
8 to NAD, NAD has an opportunity to review it. I'd love
9 the scientists that were here this morning to volunteer
10 their services -- and now we can even pay them a little
11 bit -- to help us analyze the evidence, that once we
12 issue a decision, if the advertiser elects not to appeal
13 the decision or if the advertiser elects not to comply --
14 and many do, by the way -- at the end of the day, the NAD
15 process ends most of these disputes by explaining very
16 clearly what needs to be changed and that happens.

17 But in those instances where an advertiser
18 refuses to comply or participate further in the process
19 by appealing, historically, we have only had the option
20 of going to the FTC for possible enforcement action. I
21 think it would be great if the media would begin to
22 consider its participation and support of the self-
23 regulatory system by us expanding who we give notice to,
24 so that when we reach a decision about a product and its
25 advertising and if an advertiser is unwilling to comply

1 and we think the claims are unsupported, that if we
2 notify the mediums in which that advertising was
3 appearing, that that entity would at least take that into
4 consideration in making a determination of whether or not
5 to continue to run that advertising.

6 So, I think there's a lot of potential here to
7 work -- to partner together in an area where there is a
8 lot of good advertising that suffers because there's a
9 lot of really bad advertising.

10 MS. RUSK: Andrea, can I ask you about -- and I
11 appreciate the description. I think it's very useful for
12 us all to talk about, and I'd like to explore some
13 specific ideas about it. But I also wanted to ask you
14 because you said, in the weight loss area specifically,
15 that all of the cases have come from your own monitoring
16 and that you haven't seen any instances of a competitor
17 coming in to challenge an ad. I'd be interested in what
18 your thoughts are on why that is and also from the other
19 panelists, what their thoughts are about why they haven't
20 availed themselves of the NAD process.

21 MS. LEVINE: I mean, I think that's also true
22 in the dietary supplement area as a whole much more
23 broadly than just diet products, and I think, you know, I
24 don't know that anybody wants to test the waters or make
25 waves or find out where the bright lines are. But I

1 think that to the extent that the government is now
2 saying, you have to clean up your own house or the
3 alternative will not be pretty, I mean, that's kind of
4 how NAD started in the first place.

5 If you go back 30 years ago, the FTC was
6 holding hearings on whether or not advertising should be
7 strictly regulated, and industry said, wait, give us a
8 chance, let us clean up our own house and came with this
9 proposal for this independent advertising self-regulatory
10 forum, which I know FTC was skeptical about and later,
11 now, holds up as the poster child for self-regulation in
12 America.

13 I think that it's an industry that has not
14 wanted to look internally so much at the problem areas,
15 but that the time has come to do it, and I think that the
16 lines will be drawn fairly based on what's truthful and
17 accurate just the way every other piece of advertising in
18 this country is reviewed and the same standards would be
19 applied. So, I think the sun will come up even if you do
20 begin to challenge one another's claims.

21 MS. RUSK: Do any of the companies on the panel
22 have reactions or want to share their thoughts about
23 whether they considered going to NAD and if they've
24 decided not to or --

25 MR. SHENDER: At Jenny Craig, there's been a

1 turnover in ownership and somewhat in management
2 recently. The new management team has discussed NAD. I
3 think there are two issues that have stopped us so far
4 from pursuing NAD remedies. One is, I think, there's
5 just a genuine skepticism and I think we have to have
6 internally more of an educational process with the folks
7 in marketing about the benefits that could be had.

8 And secondly, there's just the triage that you
9 have in any business where you have to decide how do you
10 allocate your resources. And at this point, we don't
11 have the extra resources to really focus on competitors'
12 ads and making the formal complaints that would be
13 required.

14 MR. BEARNSON: I think one of our concerns has
15 been what I'll refer to as pop-up companies that really
16 have no presence, no permanency in the U.S. They tend to
17 show up on the radar screen when you see their ads. They
18 have no property, plant or equipment that gives them --
19 you know, puts anything really at risk for them here.
20 And the task -- we've probably left this enforcement
21 issue up because we really have no trade industry in the
22 home exercise equipment business. But really, I guess,
23 the nemesis, I think, to this industry overall is that
24 kind of problem, because the response time, once we -- we
25 have made a couple of complaints to the FTC on claims,

1 but the response time, I think, probably comes after the
2 product's been on the market for a year to 18 months and
3 you probably have another year, at least, and they've
4 ridden the wave by then. The people that wanted to make
5 the money on the claim have made the money. They've
6 gone.

7 But I think one of the things we'd like to have
8 the FTC keep in mind is that people that have made that
9 money typically come back for more sometimes on some
10 other product, marketing something else in the same way
11 or in the same industry. So, even though they do pop up,
12 there is some potential for enforcement, I think, still.

13 MS. RUSK: Andy, what do you think about that
14 issue of who the parties are that are engaged in the
15 deceptive advertising? I know you said you get 90
16 percent voluntary participation.

17 MS. LEVINE: Maybe even higher. But I have to
18 agree that some companies are not good candidates for
19 voluntary self-regulation. I think that if you have no
20 truthful claims that you can make about your product,
21 it's not a good process. That happens sometimes.

22 And I do think that if you're not a company
23 that's legitimately based in this country that, you know,
24 all we can do is contact you and ask you to come in, and
25 then if you don't, refer the matter to the FTC. Now,

1 sometimes a company that might not be responsive to us in
2 the first instance, once they're invited down to
3 Pennsylvania Avenue and get a look at door number two as
4 opposed to voluntary self-regulation, they re-embrace
5 their voluntary system and come back to the loving arms
6 of NAD. So, that does happen from time to time.

7 So, I think that, you know, clearly there are
8 companies that we have gone through a long review process
9 with and they've appealed and they've continued to make
10 the claims and we haven't resolved the problem and we've
11 expended a lot of resources.

12 One of the ways Lisa has been very helpful to
13 us is in referring cases to us, she actually works with
14 the member company to go back and ensure, once we've made
15 a decision, that the changes are made and it's complied
16 with, so we don't have this burning through all these
17 resources and then not really resolving the problem.

18 But the outliers, I'm going to have to agree
19 with you that regulation is probably the only viable way
20 to deal with that.

21 MS. RUSK: Can you comment on the timing issue
22 because I think that's another challenge --

23 MS. LEVINE: Yes, we fly with the eagles.
24 We're not -- this is not the FTC. We are -- we function
25 in a legal nanosecond. No, I'm kidding. I'd like to say

1 that. Yeah, it is a long time, that's true.

2 Actually, we average about 70 business days
3 from the time a complaint is filed with us until we issue
4 a decision, and that can vary. People come in with a
5 U-Haul van of evidence and a filing that looks like a
6 Lanham Act case and it's going to take longer. But the
7 more concise the issues are, the faster we're able to
8 move the cases and we very much appreciate the fact that
9 the time in which the ad is permitted to run is part of
10 the problem and that the need for speed is there.

11 I am not aware of any other -- certainly not in
12 the court system or any other system which can review it
13 and issue a published decision in the time that we can.
14 But could it be faster? Yes, again, it's a question of
15 resources. I mean, we are a victim of our own success at
16 this point and have more cases per attorney right now
17 than we have in the six years that I've been there as
18 director. So, resources are an issue.

19 MS. RUSK: Okay, that was my next question.
20 Because I heard Lisa mention and I've heard other people
21 mention funding as a challenge to self-regulatory
22 efforts, and I'm wondering if you could tell us a little
23 bit about how the NAD process is funded, and also we
24 heard Commissioner Anthony talk about potentially a unit
25 within NAD, like CARU, that's devoted specifically to

1 weight loss and I know you've had some discussions about
2 that and the question would be also how -- what are the
3 possibilities for figuring out how to fund a unit like
4 that.

5 MS. LEVINE: Right. I would think -- and Jim's
6 probably better to speak to this. I think all things are
7 possible. You know, we have had a traditional model that
8 was funded through membership in the Council of Better
9 Business Bureaus to generally deal with all of the
10 complaints that come in. And at this point, you know,
11 it's generating a lot of funds and Jim works very hard to
12 bring in more. But, you know, we really don't have the
13 amount of resources that we would need to expand greatly
14 into whole new categories of advertising if the caseloads
15 increase dramatically.

16 But I think we would be certainly open to
17 discussing with groups out there the possibility of
18 funding units like CARU. CARU is a different model.
19 CARU is independently funded. It's sponsored by people
20 who market generally to children, the toy industry,
21 candy, you know, that kind of thing. And now they've
22 expanded into privacy. So, there is some precedent for
23 that. I think that, you know, this is a good time to
24 start all those kinds of discussions, both the
25 substantive and the pragmatic of what kind of resources

1 do you need to make it work.

2 MS. RUSK: I'm going to put some of our other
3 panelists on the spot, I think, and ask what do you think
4 in terms of whether your company or your membership,
5 whether it's through the NAD or through another third
6 party, would be -- how receptive do you think they would
7 be to contributing to funding a process that would sort
8 of help clean up some of the problem advertising.
9 Anybody?

10 MR. SECKMAN: Well, I'll go first. I think it
11 would be interesting contributing to that, but I think we
12 are also in favor of seeing more funds for the FTC for
13 enforcement actions. What we see is when 1 percent of
14 the dietary supplement sales are done through the
15 Internet, but we see predominantly a lot of the ads that
16 we've talked about today go through the Internet and SPAM
17 type of Internet messaging that we all get every day at
18 our terminals. So, we would like to see funding
19 increased for the FTC for more enforcement actions.

20 I know that's not a popular thing oftentimes
21 for industry to go and actually advocate for more
22 increased funding for enforcement activities, but we're
23 really talking about the outliers here that need to be
24 taken off and not be in business anymore. So, we not
25 only support the voluntary funding for NAD, but also --

1 through the membership, but also for more funding on
2 Capitol Hill for the FTC.

3 MS. MYERS: I can't speak on behalf of my
4 members without checking with them first since it's their
5 funds, but I would certainly recommend to my members that
6 ERA find a way to increase its support.

7 MS. RUSK: And you already, to some extent, use
8 the NAD model. . . and support it.

9 MR. MCGUFFIN: I mean, I can say it's tough
10 getting money from our members for any new program. It
11 really is. John knows this, David knows this. We've got
12 all kinds of great ideas and we go try to pitch them and
13 it's hard to get a quarter, you know.

14 I have no idea what the cost structure is.
15 It's something that I would have to understand before I
16 could speculate much further. But I think we'd also --
17 my membership would have to really better understand how
18 that program works. Let me just -- with all respect to
19 the panel this morning, who I think were an eminently
20 qualified group, I'm sensitive to what I perceive as
21 their bias that this whole idea of supervision is
22 absolutely essential, specifically for weight loss, but I
23 think for a lot of the things that dietary supplements
24 are used for.

25 And we'd be very concerned that whoever the

1 experts that would be making decisions at NAD about what
2 constitutes an appropriate claim, would have to include
3 some part of the industry that thinks like us, that
4 Anthony Almada was talking about, that thinks like us,
5 that buys like us, that two-thirds of you represent,
6 because there's a whole lot of Americans that really
7 support self care and I think -- you know, my perception
8 this morning was that there was some concern that a lot
9 of the nos were no because it's not under my supervision.
10 That would be another issue that would have to be
11 addressed.

12 MS. LEVINE: Yeah. I just want to make it
13 clear that NAD wouldn't view itself as bound by any list
14 of claims. We would do what we always do which is look
15 at the advertisement and look at the claim and the
16 context and assess what's a reasonable take away. And
17 both parties are always to bring in whatever experts,
18 communication experts and scientists and whatever, to
19 help us better understand the science and support for
20 their claims.

21 MR. MCGUFFIN: You know, I got a little nervous
22 when you mentioned that you could hire those people now
23 that Jim's getting all this money.

24 MS. LEVINE: Well, it isn't that much money, so
25 I wouldn't get too worried.

1 MR. CORDARO: Michelle, I would associate
2 myself with both the comments that David made and Michael
3 made and add a point. I think that the dietary
4 supplement industry has demonstrated its willingness to
5 work with Congress to get additional resources for
6 enforcement actions with the Food and Drug
7 Administration. I think that we'd be willing to do the
8 same with Federal Trade Commission.

9 I would also associate myself with the
10 difficulty of getting any money out of our members for
11 anything at this time, but I would then add the
12 observation -- my observation that I believe it's coming.
13 I think that with the challenges that the federal budget
14 has, with the challenges that exist at the state and the
15 federal level, with the difficulties that exist in the
16 real world, that companies that want to be in this
17 business and who assert that they are responsible or who
18 want to be responsible are going to need to find some
19 ways to have a competitive advantage over the egregious
20 players. And if one way of doing it is to have tougher
21 enforcement, and if that gets to be the cost of doing
22 business, I think that that will happen.

23 If they do the business calculation and they
24 see that they would get a return on their dollar, then I
25 think that there will be some leaders in this industry

1 who would be willing to step up and then I think it will
2 happen. Then that gets back at the earlier point I made,
3 the partnership between stronger enforcement action,
4 self-regulating initiatives, media involvement and the
5 industry putting dollars behind the business that it's
6 in.

7 MS. RUSK: I knew this would be a very quick
8 hour and our time is almost up. So, I think what I would
9 like to do in the last three minutes that we have this
10 afternoon is ask you for your wish from the FTC. If you
11 have one place where you would like our agency, just one,
12 to focus our efforts in the next couple of years, whether
13 that's supporting somebody else's efforts or engaging in
14 our own law enforcement or consumer education or
15 anything, where would you feel we would have the greatest
16 impact. So, I'll start with Brad again, I think, and
17 work my way down.

18 MR. BEARNSON: Well, obviously, the FTC has the
19 biggest hammer here and we think it has done an excellent
20 job, I think, of schooling this industry overall. We've
21 been a pupil in this process. But I think it's something
22 that's been needed and will continue to be needed, and I
23 guess I would say just don't lose focus.

24 I mentioned these pop-up companies. It's a
25 little bit like this game you see at carnivals and

1 whatnot where these things pop out and you try to hit
2 them with a mallet before -- and my response time is
3 maybe a little bit like the FTC's. But I think if we
4 just continue to focus on what has been happening here, I
5 think there's some good structure and there's an impetus
6 created through this process for industry members to
7 spend some of their resources in this.

8 So, I think basically what you're doing is what
9 you should be doing and just keep it up.

10 MR. CORDARO: I would just add quickly that I
11 would love to see a partnership between the FTC and the
12 dietary supplement industry, jointly coming together and
13 identifying messages and information to be communicated
14 to the public. Use the media, ask the media if they
15 would be a part of that partnership by, in essence, let's
16 call it the bully pulpit, going out and carrying that
17 message that we've jointly crafted to the American public
18 using all forms of the media. And let's do this -- let's
19 make a commitment and let's do it over significantly
20 sustained periods of time so that it makes all the
21 difference in the world.

22 DR. GREENE: I think what I would like to do is
23 speak for the Partnership for Healthy Weight Management
24 and making your suggestion a part of that partnership,
25 because I think it's been illustrated now for the last

1 three years that developing just the FTC or just industry
2 or just academia doesn't work well. And the only way
3 we're going to get, I think, where we want to all get in
4 the media is -- and for the consumer -- is with this
5 partnership.

6 So, I would vote for a partnership that builds
7 on the strengths and the framework that has already been
8 established.

9 MS. LEVINE: I don't think anybody appreciates
10 better than I how critical the support of the FTC is to
11 the existence and effectiveness of the self-regulatory
12 system. So, I would encourage us to continue that good,
13 supportive relationship, and also to the extent that, you
14 know, you have opportunities to educate new players about
15 the system or encourage competitors who come to you with
16 challenges about their competition to utilize the forum,
17 I think that would be very positive.

18 MR. MCGUFFIN: I'm reiterating a lot of what
19 previous speakers have said. I think to whatever degree
20 FTC could continue to support these areas of partnership.
21 I had no idea that the Partnership for Healthy Weight
22 Management still existed, so, I'd really like to see that
23 developed.

24 And I know you asked for one point, but the
25 second one is that enforcement is key. You guys are the

1 only ones with that big a voice and we need to continue
2 to see specific enforcement actions.

3 MS. MYERS: It makes me a proud American to be
4 a part of the opportunity to have the dialogue with the
5 FTC. So, to continue the open dialogue would be our
6 first wish.

7 And our second is we're honored to participate
8 with you on seminars like E-tail Details and coming up in
9 Chicago, Green lights, Red flags and we'd love to do one
10 on your weight loss workshop and so forth. So,
11 partnering in education. Thank you.

12 MR. SECKMAN: I'm in complete agreement with
13 what John had to say and I would add the enforcement on
14 Internet activities. I'd really like to see increased
15 enforcement activities on those FDA approved supplements
16 that I get every day as an e-mail that comes on the
17 Internet.

18 MR. SHENDER: And I guess as another company
19 representative, I agree largely with what Brad said.
20 While we're more than happy to look at the NAD model and
21 we'll try and assess that, I think in our industry with
22 all the pop-up companies, as Brad said, that enforcement
23 really is key.

24 MS. RUSK: Okay, thank you very much. We are
25 going to break for 15 minutes. We'll reconvene at 3:15.

1 And I want to thank everybody who was willing to sit here
2 today and share your thoughts, and I'd encourage you to
3 continue in your efforts. Thank you.

4 **(Whereupon, a brief recess was taken.)**

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