

LEGAL AND PRIVACY

## ANA warns of "multiple, simultaneous challenges" worldwide for advertisers

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*Daniel L. Jaffe is government executive vice president for government relations at the Association of National Advertisers*

By MICKEY ALAM KHAN

CHICAGO - The top legal executive at the Association of National Advertisers told general counsels and lawyers working for the leading advertisers that advertising was under pressure from several fronts in the United States and overseas.

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Among the threats were a partisan and toxic political environment, the effect of U.S. tax reform on advertising, national and international data and privacy security initiatives, government mandatory advertising disclosure lawsuits in U.S. courts and the need to clean up the digital advertising supply chain, according to Dan Jaffe, executive vice president of government relations at the [ANA](#).

"There is just too much at stake for everyone in the ad community who wants to stay up to date and be effective to sit on the sidelines," Mr. Jaffe said at the [ANA/BAA 39th Marketing Law Conference](#) Nov. 15 in Chicago.

*Below is the full transcript of Mr. Jaffe's talk, adapted only slightly for style*

Good morning.

I'm happy to be with you here again in the "windy city." Although many people think that Washington, DC, where I am from, is the true windy city generating enough political hot air to threaten global warming.

As you know, less than a year ago, a political earthquake hit the country when Donald Trump was unexpectedly elected President.

Now, 300 days and almost 2,500 presidential tweets later, the strong political aftershocks are still being felt.

The failure of Republicans to repeal and replace Obamacare and pass other key pieces of their agenda, even though they control the White House and both the House and Senate, has created extraordinary political pressure and turbulence.

For the ad community, one thing is crystal clear, however. We are facing more major multiple, simultaneous challenges at the federal, state, local and international levels than ever before.

So what role will advertising play in this political reality TV soap opera?  
Here are five critical challenges that advertisers are facing.

An extraordinarily partisan and toxic political environment;

The potential impact of tax reform on ad taxes;

The Iron Triangle of federal, state and international privacy and data security initiatives;

Major government mandatory advertising disclosure cases in the courts; and finally

The critical need to clean up the digital advertising supply chain and the key role advertising lawyers must play in this process.

The angry divisiveness of the presidential campaign clearly only has greatly increased during this session of the Congress.

Neil Gorsuch and the "Nuclear Option"

One of the first major acts of the president was to nominate Neil Gorsuch to the Supreme Court, to fill the vacancy left by the death of Justice Scalia.

Democrats announced they would filibuster the nomination in retaliation for Senate Republicans blocking President Obama's nominee, Judge Merrick Garland.

Republicans responded to this challenge unleashing the so-called "nuclear option" to discard the longstanding Senate rules allowing for filibusters and allowing these types of nominations to be passed on simple majority votes.

After considerable parliamentary maneuvering, Republicans rammed through a rules change eliminating the filibuster for judicial and executive branch nominations. Judge Gorsuch was then confirmed the very next day.

The extreme bitterness of that nomination process has set the tone for this political year. With the exception of disaster relief funding, the new "normal" in the Congress is for a small group of administration and legislative leaders to develop legislation behind closed doors, with no input from Democrats or rank-and-file Republicans, and to try to push these bills through with little or no hearings under very tight time constraints.

That may work in the House where Republicans have a significant margin, but in the Senate, Republicans can afford to lose only two votes. The effort to repeal Obamacare, for example, suddenly went down in flames when three Senate Republicans voted no.

The growing schisms in the Republican Party adds substantially to these difficulties.

Steve Bannon, former White House chief political strategist, has declared civil war against the GOP establishment, saying that he will find primary opponents for all incumbent Republican Senators up for election next year, other than Ted Cruz.

Senate Democrats also face serious challenges controlling their caucus.

Twenty-five of their members, the highest for either party in 48 years, will be up for re-election in 2018, many in deeply red states won by Romney and Trump.

And this reminds me of Will Rogers' famous quote, "I do not belong to an organized political party, I'm a democrat." The recent revelations by Donna Brazile in her new book hardly help the unity of the Democratic Party.

In the midst of this highly overheated political environment, marketers face some very complex challenges.

Tax reform and ad deduction

The most critical bottom-line issue for all of us is defending the immediate tax deductibility of advertising costs. The current ability to deduct advertising costs, which now is at serious risk.

As we feverishly lobbied key administration and legislative leaders, we consistently were told that restrictions on the full deductibility of all advertising costs were under "very serious consideration."

Consequently, we further ramped up our efforts even further. And here are just some of the key steps we took.

How we fought the ad tax

We held numerous "grass roots" meetings with key members of Congress as part of The Advertising Coalition (TAC). These meetings are held in the state or district offices of the member and we always try to get an ANA

company in the room.

We provided substantial funding to update a major economic report which quantifies the significant economic impact of advertising in every state and congressional district in the country to bolster our efforts to inform members of Congress about advertising's importance.

We aggressively reached out to recruit both House members and Senators to sign on to a letter supporting the current tax treatment of advertising expenses.

One hundred and twenty-four members of the House signed a letter circulated by Congressmen Kevin Yoder and Eliot Engel. Fifteen Senators signed on to a similar letter circulated by Senators John Boozman and Tammy Baldwin.

These letters were delivered to the leadership to indicate broad Congressional support for our current tax treatment.

The House Ways and Means Committee, which is the House tax committee, released its bill, the "Tax Cuts and Jobs Act," which President Trump immediately relabeled the "Cut, Cut, Cut Act," on November 2.

Fortunately, the bill contains no change in the advertising deduction. This is a very important initial victory, but it is only the first step in a long and potentially treacherous political process.

The goal of the White House and the leadership is to move a tax reform bill extraordinarily quickly. They hope to have the tax bills passed by the House and the Senate before Thanksgiving. A conference committee would meet in December to iron out differences between the two bills with a final package to be passed before Christmas.

#### Prescription drugs under attack

As an example of ongoing threats, Senator Claire McCaskill (D-MO), a member of the Senate Finance Committee, this Monday [Nov. 13] introduced an amendment to disallow the deduction for advertising expenses. It is believed that she did so due to her dissatisfaction with the prescription drug companies in regard to opioid policies and drug pricing.

We believe that this amendment, if passed, would be unconstitutional, violating the First Amendment by singling out specific speech for adverse treatment due to its content. ANA will be working with our prescription drug members and The Advertising Coalition to try to have Senator McCaskill withdraw this amendment or defeat it if it is acted on by the Finance Committee.

Republicans see tax reform as a matter of political life or death as they head towards the 2018 elections.

The Democrats' sweeping victories last week dramatically increased the heat on Republicans to succeed in moving forward this major agenda item.

Restricting ad deductibility could cost our industry more than \$200 billion in new taxes over 10 years.

We are now in just the first quarter of the Super Bowl of tax reform battles, and as other groups fight to get out of the tax package and target other sectors to replace their provisions, we need your help to preserve the ad deduction. Please have your company contact your members of Congress to express your strong opposition to any change in the full deductibility of advertising costs.

We have detailed talking points available for you on our Web site. Clearly this tax fight is far from over.

So don't pop any Champagne corks yet.

There are enormous differences between the House and Senate tax proposals, and at every step of this process we can be thrown into the tax caldron. As Yogi Berra said, "it's not over till it's over." And it's far from over.

Tax threats are only one of the major policy challenges we are confronting.

#### Data security

Privacy and data security issues are an iron triangle for our industry, with interrelated challenges at the federal, state and international levels.

Increased privacy restrictions in any of these areas is almost certain to adversely impact all the others.

Last year, the Federal Communications Commission dramatically shook up the privacy arena by throwing a regulatory hand grenade, in the form of a sweeping highly restrictive privacy rulemaking, directed at Internet service providers (ISPs). The rule on a party line vote passed 3 to 2 at the end of the Obama administration.

The rule treated all ISP browser and app use data as "sensitive," requiring opt-in consent from consumers for its collection and use.

This was a radical shift. For the first time, privacy data in the U.S. was restricted because of who collected it rather than the sensitivity of the information involved.

We pushed hard, along with other industry groups, to convince the new Congress to repeal the rule. We were successful this spring when both the House and the Senate overturned the rule utilizing the Congressional Review Act (CRA).

Politics hates a vacuum states fill it

The repeal of the FCC's broadband privacy rules, however, unleashed a massive, almost unprecedented negative backlash.

More than 20 states, the District of Columbia and several other local governments immediately considered legislation to implement some version of the FCC's ISP privacy rules.

The most serious threat was California AB375, the California Broadband Internet Privacy Act. AB375 would seriously disrupt Internet advertising by classifying virtually all ISP communication including Web browsing history and app use as personally identifiable and requiring opt-in consumer consent for the collection and use of this data.

AB 375 had considerable support among Democrats, who control the California Senate and the Assembly.

After a major lobbying blitz, AB375 was placed on the Inactive Calendar on the final day of the legislature's regular session on September 15. The bill, however, could be called up with just one day's notice when the California legislature reconvenes on January 3.

Even more threatening than AB375 is a proposed ballot initiative on consumer privacy rights that has been filed with the California Attorney General. The "Right to Know" proposal would do the following:

Allow consumers to demand from companies all of the information they have collected about them including unique identifiers, consumer histories or tendencies, browsing history, search history interactions with Web sites, ads or apps. Companies must respond within 45 days and cover the preceding 12 months.

Consumers must be given the ability to opt-out of the sharing of this information.

There must be clear and conspicuous notice on the company's Web site and signs at any physical locations with mandated language.

Violations of the act would be enforced by the Attorney General along with a private right of action allowing for significant penalties.

The proponents recently filed a 22-page amended version of the initiative with the Attorney General. Importantly, this initiative applies to both online and offline data collection. If certified by the California Attorney General and the proponents are able to collect enough signatures, it would be on the general election ballot next November, leading to a major high cost electoral battle.

But that's far from all, the European Union's General Data Protection Regulation (GDPR) and ePrivacy rules are scheduled to come into effect on May 25, 2018. These regulations will greatly impact the advertising industry, limiting the types and amount of data collection by companies operating online and mandating very granular choice disclosure mechanisms for consumer consent to data collection for E.U. customers.

GDPR and ePrivacy

Here are some of the most important changes U.S. marketers need to understand:

The GDPR is global and applies not just to EU marketers, but to all marketers that offer goods or services to EU consumers or monitor the behavior of those consumers.

The GDPR covers broadly defined personal data, including all data that can "identify" an individual.

Data processing must be justified and consent from consumers must be explicit and informed.

There are many new rights for consumers, including transparency, privacy by design and the "right to be forgotten."

Data transfers, even within the U.S., can be subject to EU rules.

Most U.S. marketers will have to designate a Data Protection Officer (DPO) or a local EU representative to be in compliance with the rules.

Notification of a data breach must be delivered to the supervisory authority "without undue delay" and where feasible, not later than 72 hours after the breach is discovered.

And there are many other requirements.

Failure to adhere to the GDPR's detailed requirements could lead to penalties of as much as "4 percent of a company's worldwide spend" or 20 million euros, whichever is the greater.

To meet this challenge, we asked our general counsel and his international experts at Reed Smith to put together detailed materials including Frequently Asked Questions concerning the GDPR requirements. All of that material is available on our Web site and a handout is available at ANA's sponsorship table at this conference. Please check it out.

Mixed messages on mandatory advertising disclosures

As Bob Corn-Revere of Davis Wright Tremaine described in a breakout session on Monday, we also are involved in two critically important lawsuits impacting the government's ability to impose mandatory disclosures in advertising.

The first challenges a San Francisco ordinance requiring health warnings in certain ads for presweetened beverages.

The second challenges a Berkeley, California ordinance which is forcing wireless producers and sellers to provide a point-of-sale public warning regarding the safety of cell phones. The cell phone warnings contradict FCC findings that these phones are safe.

The U.S. Supreme Court in *Zauderer v. Office of Disciplinary Counsel* stated that the government could impose mandatory disclosures in ads, but only to counteract false or deceptive advertising and the disclosures themselves needed to be neutral and non-controversial.

In both of these cases, the government warnings go far beyond these restrictions.

Scope of the threat

If not limited to overcoming deception, the threat of increased government requirements for mandatory disclosure are likely to impact a very broad range of advertising categories.

With over 30,000 cities and counties in the U.S., if these ordinances were to be upheld, the threat of further advertising mandated disclosures would go up substantially. These cases potentially are the new Achilles' heel of First Amendment protection of advertising.

Unfortunately, we are receiving mixed messages from the Ninth Circuit. We won a major victory in the San Francisco case when a three-judge panel of the court imposed a preliminary injunction on enforcement of the ordinance.

A different panel of the Ninth Circuit, however, declined to enjoin the Berkeley cell phone ordinance last month.

ANA has filed amicus briefs in the district court and the court of appeals in both cases and we are expectantly waiting for next steps in both cases. We will keep everyone up to date as these issues move forward.

Let me conclude by focusing on what ANA believes is the biggest present challenge for the ad community, which is: can the ad community bring order, stability, fairness and, most importantly, trust to the crucial but chaotic digital universe?

Big challenge: Trust

It has been frequently estimated that upwards of 70 percent of an advertiser's digital and mobile advertising investments are siphoned off by the supply chain before it reaches the consumer. No other media has a transaction cost that remotely approaches that level of loss.

Bot fraud alone is already costing our industry an estimated \$7 billion to \$9 billion annually.

Pirate sites continue to proliferate and undermine brands and brand value.

Ad blocking has been estimated to cost the ad community more than \$30 billion annually worldwide, and more than \$15 billion in the U.S. alone.

Far too many ads on digital media are still not meaningfully visible to consumers.

The good news is that ANA and other industry partners are working together to address these challenges. As lawyers for the world's leading brands, you have a critical role to play in this arena.

To restore the trust in the digital media and production supply chain that is under serious attack, every player must embrace transparency.

Ad lawyers must play a key active role in assuring that your companies have developed the contracts and other oversight to protect their companies' interests and ensure fair and honest business practices throughout the digital marketplace, and ANA has developed detailed materials to aid you in this effort.

#### Coalition for Better Ads

In addition, last year ANA helped launch the Coalition for Better Ads (CBA) to work on creating a better, less annoying digital ad environment so that desktop and mobile users have less incentive to block ads.

In March, CBA released initial Better Ad Standards, based on comprehensive research involving more than 25,000 consumers nationally and internationally.

For the first time, the ad community now has meaningful detailed actionable data on consumer annoyance with specific advertising practices that can lead to ad blocking.

We are actively working to develop proactive self-regulatory steps to respond to this challenge.

I am calling on all of our members to strongly consider participating in the Coalition for Better Advertising effort.

#### Get off the sidelines

There is just too much at stake for everyone in the ad community who wants to stay up to date and be effective to sit on the sidelines.

All of the initiatives I listed can only succeed if a broad range of advertisers, including their legal experts, are fully committed and involved in these efforts.

SO JOIN US. Assure that a more effective and equitable marketplace is created and maintained. This is our best and only effective response to the growing pressures we will increasingly feel from legislators, regulators, the courts and a rapidly-changing marketplace.

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