

# SPALDING & THOMASON

LAW OFFICE

From The Desk of  
Lee Thomason, Esq.

June

23, 2010

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex J)  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

Project                      Re: Food Industry Marketing to Children Report: Paperwork Comment  
   no. P-094511

Dear Acting General Counsel Shonka,

The following comments are submitted on behalf of the undersigned, only, and in regard to the request for public comments on the proposed information collection and the associated Paperwork Reduction Act burden estimates, published at 75 Fed. Reg. 29340 (May 25, 2010). The comments and viewpoints expressed here are those of the undersigned, in my individual capacity, and are not to be taken as representative of the view of other person, any company, or of any client(s) of the signatory, past or present.

It is proposed that the FTC will use its legal authority to “compel production” of marketing and nutritional information, from “food and beverage” companies and marketers, and from “quick service restaurant companies.” This will compel “much of the same types of data and information collected” previously by FTC in 2006 from 40 of the same companies, but now, the “FTC proposes to send information request to 48” companies. What new conclusions could derive from the same type of data is uncertain.

The current round of information “requests will require the companies to provide their marketing activities and expenditures,” during 2009, “in 18 different measured and unmeasured media categories,” and to break out the “expenditure reporting in each media category,” as well as to break expenses out “separately for marketing activities directed to children ages 2 – 11 and for those directed to adolescents ages 12 – 17.”

After expanding further on the requirements, the recent Notice concludes that a company could “respond to an information request” in as few as 150 hours.

The Notice omitted, or did not include, details of how many hours it actually took the 40 companies previously to respond to the 2006 requests for “much of the same types of data and information.” Actual experience data would provide more objective support than mere estimates. 5 C.F.R. §1320. Factual data about the paperwork burden on recipients of the prior

requests would and should carry more weight than “staff estimates” of the “estimated hours burden.” It respectfully is suggested that before compelling this round of marketing data, based on “estimated hours,” that the FTC obtain, from the prior 2006 respondents, specific information on the paperwork burden of preparing their responses.

Two guiding principles of the Paperwork Reduction Act are to limit collection of information which has “practical utility,” and to avoid the collection of unnecessary or duplicative data. An overarching consideration is whether the collected information is “necessary for the proper performance” of the agency’s functions. 44 U.S.C. §3508.

Now, the FTC intends to compel “much of the same types of data and information collected” from mostly the same recipients, plus a new 8 recipients. Where the planned requests are not duplicative of previous requests, the requests are more burdensome. In addition to the many enumerated categories of marketing expenses in 2009, the responses now must include “nutrition information about the products” marketed in “calendar years 2006 and 2009,” as well as “information on the nutritional density” of products, “for each item advertised to youth in 2009 and 2006.” That will add to the time and effort required to amass the paperwork responsive to the FTC’s “compulsory process.”

In conclusory fashion, the current Notice states that the agency “does not believe that requiring companies to provide the [nutrition] information is burdensome.” That conclusion is based on ‘beliefs’ that the companies have this information, *e.g.*, have “databases” that may contain information required to comply with labeling laws. That the companies have information perhaps is fair to assume. Now, however, the question is the burden of collecting it, and putting in a database/spreadsheet format for the agency.

Furthermore, the Notice acknowledges that for food or restaurant “companies that use substantial amounts of unmeasured media for advertising and promotional activities, the hours required to respond will be greater.” (*fn.* 23). Also added on top of the 2006 requests are requirements to produce “market research” that relates to “neurological or other factors that may contribute to food advertising appeal among youth,” as well as “marketing to individuals of a specific gender, race, ethnicity, or income level” within the intended audience.

The added, topical categories of compelled information hardly were factored into the estimable burden. The agency surmised that “companies’ experience in answering the 2007 requests will” aid them, “thus lessening the time needed to compile and submit the data” again. That experiential discount all but ignores that there are added categories and topics of inquiry in this proposed set of information requests.

The Notice describes information requests that will track the 2006-07 requests, which ran 40+ pages, single-spaced, with many discrete subparts. Unspecified at this time is how many more pages will be needed to layout the additional categories and topics of information requested for 2006 and 2009.

The hours of time - for employees to gather, for financial and legal professionals to review, and for marketing and executive personnel to finalize and approve what goes into a response to the agency's requests - cannot be underestimated. The total, estimated hours are one yardstick to measure the utility of the requests and whether the information is necessary. Is the requested "Paperwork," estimated to entail untold hours of FTC time and up to an "estimated" 43,200 hours (48 companies x 900 hours) of respondents' time, worth the effort or necessary to the agency's statutory mission? The agency fixed the "estimated total cost" to respond at \$5,265,000, based on a total estimated 17,500 hours. The Notice plainly suggests that the time and expense might be three times greater. That cost is akin to an unlegislated tax on the companies subject to the compulsory process.

Some have observed that the FTC's information gathering involves a chosen premise in pursuit of a selected conclusion. The pejorative premise is that restaurant marketing is "targeted to children." That 'targeted' premise gets correlated to the agency's enforcement authority against "unfair and deceptive acts." So grounded, the information requests seek support for conclusions about "childhood obesity."<sup>1</sup> The prevention of obesity, and the panoply of causes of "childhood" or "adolescent" obesity, and the "prevalence of obesity within particular minority youth populations" are not viewed by many as a necessary mission of the FTC. To the extent that FTC is seeking information not "necessary" to its mission, then that increases the estimable burden to compile and submit the extensive information to be compelled from these companies.

In regard to the QSR (quick service restaurant) companies that will be subject to the agency's compulsory process, there are some added burdens. The FTC's July 2008 Report acknowledged that QSR companies are comprised of "independent franchisee-owned establishments" and "corporate-owned establishments," and that the "franchisee- and affiliate-owned restaurants far outnumber company-owned restaurants."<sup>2</sup> Also, the methods and modes of QSR advertising is divided between "cooperatives or programs to which corporate-owned and franchisee-owned establishments contribute funds," and "separate advertising funds in individual local markets," as well as the advertising by the "corporate-owned restaurants." It is especially burdensome for QSR companies to compile the information from each of these separate sources, particularly since the QSR companies do not control the franchisees, who may choose to promote youth sports programs, or support school trips, teen choirs, *etc.*, in their locale. The added burdens, unique to QSR companies and their franchise business model, were misperceived by the

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<sup>1</sup> Even after the 2006-07 information gathering exercise, the agency's 2008 Report summarily stated that "Whether there is a link between food marketing to children and childhood obesity is a question," but then and now, it was a "question not addressed by" that July 2008 Report.

<sup>2</sup> See, fn. 20, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*. [www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf](http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf)

FTC in its 2008 Report as a cause for “under-reporting” of advertising expenses.<sup>3</sup> For the present inquiry into the paperwork burden of the proposed information requests, the QSR business model should not raise suspicions of under-reporting. The fairer inference is that the QSR business model is a factor indicating that the burdens of the proposed compulsory process are visited more heavily on some companies than others.

Finally, a paperwork burden not considered in the Notice is records retention. Much of the information to be requested is not of a type that needs to be retained by companies. However, once the data is subject to the “compulsory process” of a federal agency, or related to an official FTC inquiry, or response thereto, then the appropriate retention period changes. The summary data, spreadsheets, *etc.*, that are submitted to the agency might have to be retained, when otherwise, it all was not required to be kept. The more burdensome aspect is the retention all the core data, supporting data, excluded data, and related data, *etc.*, which was considered in preparing the submission to the agency. Retention of records takes additional time, and entails additional costs, which were not considered in the Notice.

Data on the actual time and burden for companies to respond to the 2006-07 information requests should be included in the administrative record, before a decision is made on the paperwork burden associated with the planned, current information requests.

The undersigned appreciates the time taken to consider this submission.

Respectfully submitted,

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<sup>3</sup> The text on page 6, which goes with fn. 20 in the 2008 Report, states: “It is also true that there was under-reporting in some categories.”