



July 6, 2011

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex W)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Interagency Working Group on Food Marketed to Children: FTC Project No. P094513

To Whom It May Concern:

This comment is being submitted on behalf of Ventura Associates International LLC to voice our serious concerns with the proposed federal ban on advertising foods to those under age 18. For many years, Ventura has partnered in promotion and other marketing efforts with leading food brands and we are proud of that partnership.

At the outset, we would note that there is no reason to believe that food advertising is responsible for the rise – in recent decades – in obesity. To the contrary, there are strong reasons to believe this is not true: For one thing, child exposure to food advertising has declined in recent decades as obesity has been on the rise. The FTC's own Bureau of Economics identified this decline in a recent report. This would hardly support the notion that food advertising contributes to obesity. Moreover, several international markets (where First Amendment commercial speech rights are not present) have had similar advertising bans in place for decades, and these bans have produced no positive results on obesity rates.

Leaving aside for the moment the propriety and constitutionality of banning advertising, such a ban would only make any sense at all if the banned products themselves actually contributed to obesity. But here, the proposed advertising ban bars the marketing of numerous foods that play no role whatsoever in fostering obesity. For instance, the ban being proposed here would bar the marketing of foods like salads (assuming salad dressing is used), bottled water, unsweetened cereals, whole wheat bread, soup, and canned vegetables. We would be interested in seeing the agencies' precise scientific basis for banning the advertising of these particular foods. Surely, it is highly inappropriate for the federal government to seriously infringe the economic and constitutional rights of those who market these products without a specific scientific reason for believing that these foods contribute to obesity.

The reality is that virtually no foods that are prevalent in the American diet meet the proposed standards. And the "banned" products include numerous foods that FDA regulations define as "healthy," that FDA expressly authorizes to make health claims, that USDA deems beneficial for children through its WIC (Women, Infants, Children) food assistance program, and that USDA promotes for consumption through the U.S. Dietary Guidelines. These foods do not contribute in any way to obesity and deliver significant public health benefits. It is awfully hard to find a scientific basis for the proposed advertising ban.

Equally troubling is the manner in which the proposed ban defines what it means to be "marketing to kids." The definition is incredibly overbroad, prohibiting food manufacturers even from using iconic animated characters on their packaging (even those that are part of their own logos and trade dress), even when the product is aimed exclusively to adults. Aside from stripping food companies from key intellectual property assets, here are some of the other activities that are deemed to constitute marketing to kids (such that food companies would be precluded in engaging in these activities, except with the rare product that meets the IWG's standards):

- Sponsorship of a public entertainment event (like a sporting event or state fair) that may involve kid-oriented activities.
- Sponsorship of the U.S. Olympic Team (or any other team involving kids under 18).
- Sponsorship of charities that benefit kids (like Special Olympics, March of Dimes, Make-A-Wish, child-literacy programs, little leagues, etc.)
- Having a social media page, or YouTube video, where a mere 20% of the audience consists of kids.
- Using an animated figure, like Santa Claus or the Easter Bunny, on a package.
- Employing a celebrity or famous athlete that is “highly popular” with kids.
- Use of the words “child” or “kid” on a package, even in communications to parents like “your child will love this bread.”
- Promotional tie-ins with G-rated movies.
- Advertising on television using kid-directed content, even on a show that is not a kid show.
- Advertising on shows with an audience of 30% children ages 2-11 or 20% adolescents ages 12-17. (Thus, up to 80% of the audience can be adults, and the advertising would still be banned.)
- Advertising during a “daypart” or “programming block” containing kid shows, even if the ads run solely on shows that have a 100% adult audience.

Thus, this is not just a ban on child advertising – it is a ban on many marketing communications to adults as well. And the notion that kids are old enough to drive a car, hold a job, and pay taxes, but not old enough to receive advertising for products like bottled water, is awfully hard to justify.

Both because it is unwarranted and unsupported from a public policy standpoint, and also because it is incredibly overbroad, this advertising ban would never survive a First Amendment commercial speech challenge. Recognizing this, the agencies have sought to avoid judicial review by captioning the regulations as “voluntary” guidelines instead of actual regulations. This is perhaps the most disturbing aspect of this whole initiative. At bottom, we have four federal agencies who have incredible discretionary power over the food industry implementing a massive regulatory burden on the food industry, coercing the industry into complying, and then hiding behind the “voluntary” label to shield the regulations from normal scrutiny and judicial review under the Constitution and the Administrative Procedures Act.

If this is permitted to move forward, there would be nothing to check the power of agencies. They could coercively regulate at will provided that they stop short of formal regulations – and their “voluntary” regulations would be unchallengeable. This would be an enormously dangerous precedent – and not just with respect to advertising. But certainly, within the advertising and promotion marketing industry, we are deeply troubled by the concept that the government could de facto bar promotion of products of which it arbitrarily disapproves, and do so without any mechanism for redress by the affected industry. This is wholly inconsistent with the First Amendment and would also reflect an abuse of power by the agencies involved.

This proposed “voluntary” advertising ban should be withdrawn.

Respectfully submitted,

Al. B. Wester III
President