



The Association of Magazine Media

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## **Interagency Working Group on Food Marketed to Children: General Comments and Proposed Marketing Definitions: FTC Project No. P094513**

### **Comments of the Magazine Publishers of America**

Established in 1919, the Magazine Publishers of America (MPA) is the premier consumer magazine association, representing hundreds of domestic publishing companies, international publishers, and associate members. MPA members publish well over a thousand different titles, including some of the nation's best-known and most loved magazines. Our diverse membership also includes publishers of many small, regional, and niche titles serving very diverse communities and interests. On behalf of our member companies, we are pleased to comment on the Interagency Working Group's (Working Group) preliminary proposed nutrition principles to guide industry self-regulatory efforts, and thank the Working Group for the opportunity to do so.

MPA has a long history of supporting the Working Group's primary objective of promoting children's health and reducing the incidence of childhood obesity. We've offered constructive comments on similar regulatory initiatives in the past, and our titles devote a significant percentage of their editorial pages to health related content.

General support notwithstanding, in evaluating the proposed principles, we believe the working group is right to express the First Amendment concerns raised in the

questions accompanying the report. Though framed as voluntary, when sponsored by the government, companies will feel a strong pressure to comply with the principles. This is particularly troublesome given their overbroad and over burdensome nature, and the practical and economic burden they place on magazine publishers. Coupled with a tenuous link between advertising and its impact on diet, not only could the principles fail to pass constitutional muster, but as drafted, they could have an unnecessary deleterious impact on the magazine industry.

### **The Overbroad and Burdensome Principles Create a First Amendment Challenge**

In seeking to achieve the laudable public policy goal of combating childhood obesity, an effort MPA supports, it is of paramount importance that it be accomplished without intruding upon First Amendment rights for commercial speech. To help identify restrictions that unconstitutionally abridge commercial speech rights, the Supreme Court established a four part test, first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.<sup>1</sup> The test asks a series of questions related to lawful, non-misleading speech, including whether the government's policy directly and materially advances its asserted interest, and whether it is done in a way that is no more restrictive of speech than necessary to advance its asserted interest. We believe that the principles as drafted fall short of these standards in a number of ways.

#### **Overly Restrictive Parameters**

As proposed, the sweeping principles fail to satisfy the threshold question of whether they are more restrictive than necessary. For a 'measured' media like magazines, establishing a threshold of 20 percent for adolescent readership, as proposed

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<sup>1</sup> 477 U.S. 557, 566 (1980)

in the principles, means that even if a magazine were to have an audience that was 80 percent adult, the advertising would still be considered as directed to adolescents. The IWG report appears to acknowledge this overreach, asking whether the percentage is “over-inclusive so as to include marketing directed primarily to adults.”<sup>2</sup> Similarly, the report seems to indicate the Working Group’s acknowledgement that the definition of adolescent (12-17) is overly broad, noting the significant developmental differences within the age group.<sup>3</sup>

The issues raised by the expansive age range of the adolescent bracket and low targeted audience percentages are numerous. Including 17 year olds (and older teens more broadly) in the adolescent age bracket is particularly troubling – advertising targeted to 18-21 year olds will unquestionably also reach some younger readers. The age range and low percentage threshold may, therefore, cause magazines that are not intended to appeal to youth audiences to undertake expensive audience measurement surveys and/or to lose advertising covered by the principles.

One MPA member magazine that currently measures its teen audience has a readership that is 70% over 18; of the remaining readership, twice as many readers are aged 15-17 as 12-14.<sup>4</sup> Advertising campaigns designed to appeal to the overwhelming majority of the readership that is 18 and older will certainly be seen by those 15 – 17, as well as by the much smaller number of 12-14 year olds. Placing low-threshold limits on advertising to adolescents could create an effective prohibition on advertising to the vast majority of the readership. If one were to look at the percentage of readers aged 12-14 or

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<sup>2</sup> Working Group Report, pg. 24

<sup>3</sup> “The Working Group recognizes, however, that similarly broad restrictions on marketing both age groups would not take into account development differences between adolescents and younger children...” pg. 17

<sup>4</sup> Based on 2010 MRI TwelvePlus Report

15-17 separately, the magazine would not eclipse the proposed 20 percent threshold for adolescent readership. But by creating a bracket encompassing readers spanning six years, this title, and others like it, could now be subject to the principles. The broad definition of adolescents and the low audience percentage threshold seem to contradict the report's concern regarding over-inclusiveness, and contributes to the First Amendment failings of the principles.

The broad list of definitions of marketing may also raise First Amendment concerns. Magazines have a long history of providing health related editorial content – nearly 15% of all editorial content was devoted to health issues in 2010.<sup>5</sup> Further still, many magazines are providing exactly the kind of messages that should be encouraged in the fight against obesity – providing teens with healthy eating advice and information about exercise, answering questions about health and weight, and promoting a positive body image. We are concerned that sponsored editorial content – where a product manufacturer provides the financial backing for an editorial piece that does not include description or endorsement of a product – might be caught up in one of the 20 definitions of marketing, potentially restricting a valuable mechanism for providing beneficial educational content. This type of sponsored content may also include Public Service Announcements, which send positive messages to adults, teens, and children alike.

The expansive marketing definitions also raise concerns with regard to social media. Magazines increasingly have a varied portfolio of content offerings, and social media is a growing part of magazines' interactive relationship with readers. The expansive marketing definitions in the guidelines carry over to an amorphous definition

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<sup>5</sup> Hall's Magazine Reports, 2011

of social media, which could have a significant chilling effect on the development and feasibility of interactive web offerings tied to magazine editorial content.

*Inadequate Policy Basis*

In addition to the narrow tailoring requirements of the *Central Hudson* test, restrictions on speech are also required to advance the government's interests. Though childhood obesity is certainly a complex problem attributable to multiple factors, the Working Group has failed to show the existence of a link between advertising and childhood obesity. To the contrary, in a 2005 report, the Institute of Medicine determined that "[T]here is presently insufficient causal evidence that links advertising directly with childhood obesity and that would support a ban on all food advertising directly to children."<sup>6</sup> In a recent survey of teenage female magazine readers, 85 percent believed that eating well is important for good health. A nearly identical percentage indicated that those polled like to make their own decisions.<sup>7</sup> This data would seem to suggest that rather than being influenced negatively by advertising, adolescents understand the impact of the food choices they make. Further still, they are likely to reject an intrusion into their decision making process. Appropriate advertising of food products to adolescents has the power to help aid the development of young consumers to make the decisions they will soon face when confronted with advertising in "adult" media – a distinct benefit for making lifelong choices.

As mandated by the 2009 Omnibus Appropriations Act, we believe further study is necessary on the link between advertising and diet. Failing that, the principles are

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<sup>6</sup> Institute of Medicine, *Preventing Childhood Obesity: Health in Balance* (2004).

<sup>7</sup> Gfk MRI Teenmark 2010

unlikely to satisfy the *Central Hudson* requirement that they directly and materially advance the goal of addressing childhood obesity.

### **Economic Impact**

Events over the last several years – such as the recession – have posed difficult challenges for the magazine industry that have had a negative economic impact. The expansive new restrictions contained in the proposed principles – recently estimated to produce at least a 20 percent decline in food and beverage advertising<sup>8</sup> – would present another serious challenge for magazine publishers. Without adequate advertising revenues, magazines could be faced with a choice of cutting back circulation or editorial content, or raising prices – all bad outcomes for consumers, particularly when magazines are delivering important health information directly relevant to the overall objective.

We are also concerned that the principals could be viewed as obligating publishers to measure their youth and adolescent audiences, a potentially unnecessary cost for a magazine that is not “targeted” to children or adolescents and therefore has never participated in teen audience measurement surveys. Requiring them to “prove” that their audience is sufficiently adult is an unfair burden on publishers. Also, some titles may not be able to participate in audience measurement due to smaller readership numbers. Even for larger publications, sample sizes may not be adequate, making measurement data unreliable. MRI, one of the most commonly used data sources for measurement of teen titles, often contains qualifications on the data it collects based on statistical issues like sample size.

### **Effect of Self-Regulation**

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<sup>8</sup> IHS Consulting Data, July 2011

Looking at the economic data on food advertising in magazines provides an illuminating indication of the impact of self-regulation that has already been put into place. Following the establishment of the Children’s Food and Beverage Initiative (CFBAI) in 2006, magazines targeted to children and (predominately) adolescents experienced a 15 percent decline in ad pages for food related products – business that has never returned.<sup>9</sup> This established, functional system of self-regulation has made a difference and should be given deference.

Self-regulation is not limited to the CFBAI. Magazine publishers have always been guided by the needs and desires of their readers and the appropriateness of both editorial content and advertising. Publications that are targeted to children are sensitive to the interests and concerns of the parents that purchase the magazines and read them with their children. Publications targeted to teens are respectful of the unique needs and concerns of that demographic. The bond of trust between publishers and readers inherently guides the editorial and advertising content contained within each magazine.

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We thank the Working Group for the opportunity to provide comments on the proposed principles. We urge the Working Group to give careful consideration to the serious First Amendment concerns raised by us and other commenters – attempting to solve the problem of childhood obesity by limiting marketing of food and beverage products is inherently challenging. We also urge the Working Group to take into account the negative economic impact likely to result from the proposed “voluntary” guidelines. We respectfully ask the Working Group to follow the intent of the initial statutory language by completing a comprehensive study of the issues raised in the report.

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<sup>9</sup> Kantar Media Data, 2011