



July 14, 2011

**Via Electronic Submittal**

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

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

Dear Secretary:

The Toy Industry Association (“TIA”) appreciates the opportunity to submit comments in response to the request for public comment by the Federal Trade Commission (“FTC”), the Food and Drug Administration (“FDA”), the Centers for Disease Control and Prevention (“CDC”), and the U.S. Department of Agriculture (“USDA”) (collectively the “Interagency Working Group” or “IWG”) on the *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts* (“IWG Proposed Principles”).<sup>1</sup>

TIA, founded in 1916, represents the interests of more than 500 member companies involved in the toy and youth entertainment industry. Our members, many of whom are small businesses, account for more than 85 percent of U.S. domestic toy sales. Members include producers, distributors, and importers of toys, games, and youth entertainment products sold in North America. The toy industry is a \$68 billion industry in the U.S. It is estimated that over 500,000 U.S. jobs are associated, directly or indirectly, with the U.S. toy industry. TIA is recognized by governments, agencies, non-governmental advocacy groups, consumers, the media and the trade as the authoritative voice of the North American toy industry.

Childhood obesity is a serious concern. The causes are many and complex and the toy industry claims no expertise relating to nutrition standards. We are, however, vigorous supporters of active play for children. TIA sponsors a website, [www.ToyInfo.org](http://www.ToyInfo.org), where parents can find information about ways to help kids be active and stay active. We share the desire of parents, healthcare officials and the government to get kids up and moving to counteract childhood obesity.

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<sup>1</sup> *Interagency Working Group on Food Marketing to Children: Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts*, released April 28, 2011, available at: <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.

The sales of sports and outdoor toys were up 9% from 2009 to 2010 and one of the main trends identified by TIA at our 2011 Toy Fair was a new emphasis on toys that promote “Performance Play.” Toy makers offer many elements in toy categories outside the sports and outdoor toy category to encourage kids to “get up and move,” including games, role play accessory items, and infant/ preschool toys. Our members tell us the market for “activity toys” has increased and continued growth is expected. In fact, recent research suggests that children who have more play options to choose from are the most active and burn the most calories.<sup>2</sup> We are very proud of the contribution our industry is making in offering fun, safe products that help keep kids active.

The IWG Proposed Principles focus on limiting marketing and advertising in a manner that could have a profound effect on many other industry sectors beyond the food industry, including the toy and entertainment sectors. TIA has long been an advocate of sensible measures to protect children and to promote responsible advertising to children. When it comes to advertising, TIA has been a leading supporter of advertising self-regulation for child-directed advertising through the Children's Advertising Review Unit (“CARU”). CARU’s *Self-Regulatory Program for Children’s Advertising* addresses advertising directed to children.<sup>3</sup> TIA is a formal Supporter of CARU and provides regularly-scheduled educational sessions to members to assist them in understanding and complying with the CARU Guidelines. We encourage all companies in the toy industry to adhere to the highest standards of good practice in all of their advertising communications, especially communications to children. We do not believe, however, that the proposed principles limiting advertising reflect sound public policy. Therefore, in response to the invitation by the IWG to comment on the proposed principles, definitions and implications, we write to highlight four major concerns about the proposal.

Our first major concern is that the proposed definitions of marketing to children and teens are simply overbroad. Not only do they treat all children up to age 18 similarly, without regard to the recognized difference between younger children, older children, and teens, the principles apply to all media and to all marketing venues. Television, radio and print advertising are covered, along with advertising on third-party websites. In addition, company-sponsored websites, point of sale and packaging are covered, as well as event sponsorships, contests, sweepstakes and premiums, and toy co-branding. Even philanthropic activities would be restricted using these broad definitions. Apart from the fact that the proposed demographic benchmarks would bar advertising when only 30% children or 20% teens are in the audience, defining such advertising to include use of characters that “appeal” to children or teens establishes an impossibly vague standard.

While we recognize that the proposed principles are intended to address only the marketing of food to children, we believe that the precedent they could establish for marketing to children generally, in particular the marketing of toys and entertainment products, requires the IWG to exercise the utmost caution in drafting and to be more judicious about the potential reach of the principles.

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<sup>2</sup> *Effect of Increasing Toy Variety on Children’s Physical Activity*, D. Fedra, M. Lambiase, T. McCarthey, J. Barkley, J. Roemmich, presented at the American College of Sports Medicine 58<sup>th</sup> Annual Meeting and 2d World Congress on Exercise is Medicine, June 2, 2011.

<sup>3</sup> Children’s Advertising Review Unit, *Self-Regulatory Program for Children’s Advertising*, available at: <http://www.caru.org/guidelines/guidelines.pdf>. CARU’s Guidelines define “children” as under 12 years for advertising purposes but, consistent with the Children’s Online Privacy Protection Act (“COPPA”), under 13 for privacy purposes.

For example, toys by their nature appeal to children. Many toy ads are directed to parents but of course highlight products that are intended for and appeal to children. Applying an “appeal to children” standard generally could not only render the marketing of toys all but impossible, but would also threaten the ability to advertise core entertainment offerings.

Moreover, the inclusion of packaging in any definition of what constitutes “marketing to children” could result in a precedent with unintended consequences for toy packages which often include important instructions for parents or caregivers. The IWG must take particular care not to publish principles that could in any way jeopardize the ability of any advertiser to communicate protective language contained on packaging to parents.

Second, the FTC’s own research on advertising does not support the premise that advertising restrictions are likely to be an effective solution. Television advertising remains the most important advertising vehicle in communicating about products of interest to children. The FTC noted, for example, that its own analysis did not support the view that children are exposed to more TV ads than previously; children’s exposure to food advertising fell an estimated 9% between 1977 and 2004.<sup>4</sup> In the face of that research, we are puzzled by the IWG’s focus on advertising and marketing limits as the exclusive response to concerns about childhood obesity.

Third, in response to the request for comment on economic aspects, in our view a broad prohibition on food advertising could have significant economic and other consequences to the entire advertising and entertainment ecosystem that the IWG has not attempted to quantify. Publishers and producers need to maintain a certain level of advertising income to fund free content, so advertising costs could well increase if a particular sector is foreclosed from advertising. Because CARU and network guidelines limit the types of products that can appropriately be advertised to children, however, the result could instead be the collapse of some advertising markets. This would result in the disappearance of some free content for children and families, triggering economic impacts on the entertainment industry as a whole. While attending an event in Canada, where a provincial ban on television advertising to children is in effect in Quebec, I was advised that no children’s television programming is available as a result of that ban. Surely this is not a useful outcome. We believe it is important to quantify these economic impacts, especially given the serious questions about the effectiveness of such broad advertising restrictions.

Finally, the IWG invited input on First Amendment implications of the proposal. We believe the proposal presents serious constitutional concerns. By enacting the 2009 Omnibus Appropriations Act (H.R. 1105), Congress has required the IWG to develop guidelines for the nutritional quality of foods marketed to children under 18 and to report back to Congress on the standards and on industry’s adoption of their joint proposal. When four government agencies issue “guidelines” on the content of advertising in response to a Congressional mandate, and promise to report to Congress on their “incremental adoption” by industry, those guidelines do not appear to be at all voluntary. Government restrictions on the content of advertising of the sort reflected in the IWG Proposed Principles will not withstand constitutional scrutiny. They are not only inconsistent with the Supreme Court’s recent

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<sup>4</sup>*Children’s Exposure to TV Advertising in 1977 and 2004, Information for the Obesity Debate*, FTC Bureau of Economics, June 1, 2007, , p. ES-5, available at: <http://www.ftc.gov/os/2007/06/cabebw.pdf>.

conclusion that “minors are entitled to a significant degree of First Amendment protection,”<sup>5</sup> but the broad definitions could restrict the ability to market truthful information to any audience in any media or venue, including media entitled to the highest degree of constitutional protection.<sup>6</sup>

In sum, our industry is second to none in its deep concern for the wellbeing of children, strong support for responsible advertising self-regulation, and belief in the positive role that games and toys play in the lives of our children. We also believe that the right to advertise legal products in an ethical manner to appropriate audiences is a core societal and constitutional value. The IWG Proposed Principles would broadly limit advertising as the exclusive means of addressing a multi-faceted social issue, raising deeply troubling legal and policy questions that affect all advertisers and potentially threaten core speech values. The IWG Proposed Principles are overbroad, are unlikely to advance interests in positively addressing obesity, and are not appropriately tailored to minimize burdens on protected speech. TIA appreciates the opportunity to express its grave concerns about the approach collectively proposed by the FTC, FDA, CDC and USDA.

Respectfully submitted,

Carter Keithley  
President



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<sup>5</sup> *Brown v. Entertainment Merchants Assn.*, No. 08-1448, slip op. at p. 6, citing *Erzoznick v. Jacksonville*, 422 U.S. 205, 212-213 (1975).

<sup>6</sup> *Reno v. ACLU*, 521 U.S. 844 (1997).