

MOTION PICTURE ASSOCIATION OF AMERICA

COMMENTS ON PRELIMINARY PROPOSED PRINCIPLES TO GUIDE INDUSTRY SELF-REGULATORY EFFORTS

General Comments and Proposed Marketing Definitions:
FTC Project No. P094513

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I. Introduction.

The Motion Picture Association of America, Inc. (MPAA) submits these comments in response to a request by the Interagency Working Group on Food Marketed to Children (öWorking Groupö) for input on Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts (öRequest for Commentö). The MPAA is a trade association representing producers and distributors of theatrical motion pictures, home entertainment, and television programs, including Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc. Its members produce and distribute some of the world's most popular content, including wide-release motion pictures, documentaries, television programming, and children's and educational fare.

The Working Group was directed by Congress in the Omnibus Appropriations Act, 2009 (H.R. 1105) to conduct a study on food marketing and submit a report containing its findings and recommendations. These comments are intended to inform the Working Group and help shape its recommendations to Congress. We stress at the outset, however, that the charge of the Interagency Working Group is to study this issue and develop recommendations for Congress in the form of a report. Four federal agencies generating uniform övoluntaryö standards, then pressuring the industry to adopt them, goes far beyond the jurisdiction of the Working Group.

II. Overview.

Childhood obesity is without question a serious issue in the U.S. This societal problem involves many complicated factors, including rising numbers of poor children, unhealthy diets, and lack of exercise. Improving the diets of children is certainly a worthy goal, and one that each of us should strive to achieve. But government restrictions, while intended to protect the health and safety of its citizens, also impose certain costs. Balancing those costs and benefits is the tricky part.

The proposed principles may be well-intended, but they are inappropriate and ultimately should not be advanced for a number of reasons:

- First, industry guidelines that are promulgated by government agencies, including an agency with enforcement powers such as the FTC, can never be truly övoluntary.ö Companies will be under pressure to comply with the guidelines or risk adversely impacting their relationship with these agencies and Congress. To be truly voluntary, the guidelines would need to be developed and agreed to by the industry; however, as proposed, the principles face widespread opposition.
- Second, the proposed principles would restrict a substantial amount of constitutionally protected speech in violation of the First Amendment.
- Third, there is no clear evidence that such burdensome food marketing restrictions would actually reduce childhood obesity. Researchers are still trying to

understand the complicated interplay of numerous contributing factors, such as poverty, education, and an increasingly sedentary lifestyle.

- Fourth, the proposed principles are over-broad and too far-reaching. For studios, the impact on jobs and lost revenue or other forms of in-kind payments, such as marketing promotions, would be significant. MPAA is also very concerned about damage the principles would cause to the artistic and creative process of film production.

Moreover, the proposed principles fail to take into account the self-regulatory initiatives of the food and beverage industry and voluntary pro-social efforts currently being undertaken by a wide range of industry supporters to combat childhood obesity.¹ Therefore, the MPAA urges the Working Group to rethink its approach by focusing its report to Congress on industry-led initiatives rather than government directives.²

III. Discussion.

A. Industry Guidelines Promulgated by Government Agencies Are Not Truly Voluntary.

The proposed nutrition principles were developed by the Working Group, which is comprised solely of government agencies, in the absence of industry participation.³ As a practical matter, industry guidelines that are promulgated by the government can never be truly “voluntary.” In this context, the principles would be particularly coercive, because the FTC is the government agency that enforces consumer protection laws against the very commercial entities targeted by the food marketing guidelines. The Working Group also intends to recommend the proposed nutrition principles to Congress. Under these circumstances, companies will feel pressure to comply or risk adversely impacting their relationship with

¹ The Ad Council has worked to address childhood obesity with donated multimedia efforts since October 2005 that have equaled \$170 million. This initiative includes creative partnerships with the NFL and the U.S. Olympic Committee. *See also* Children’s Advertising Review Unit Self-Regulatory Program and Children’s Food and Beverage Advertising Initiative, available at www.bbb.org/us/children-food-beverage-advertising-initiative. The Initiative is a voluntary self-regulation program comprising many of the nation’s largest food and beverage companies. The Initiative is designed to shift the mix of foods advertised to children under 12 to encourage healthier dietary choices and healthy lifestyles.

² *See* Statement of Sen. Sam Brownback, 155 Cong. Rec. S 2930, 2949 (Mar. 10, 2009) (“It is my firm belief that the best option to address this issue is not by rushing into government regulation but by working together to address this issue within our spirit of a free-market society and that is the intention behind this language that directs the Federal Trade Commission to create a working group among the Food and Drug Administration, the Centers for Disease Control and Prevention, and the Secretary of Agriculture. I have found that oftentimes the best results are rooted in industry-led reforms and it is my intention that this working group will keep this intent in mind as they study and develop ways in which to address foods marketed to our children.”).

³ The Working Group is comprised of representatives from the Federal Trade Commission (FTC), the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the United States Department of Agriculture (USDA).

Congress and the agencies in the Working Group, which in some cases hold significant regulatory authority over the impacted companies.

Government action that chills protected speech violates the First Amendment.⁴ At a minimum, the principles carry an implicit threat of further government action or sanction for parties unwilling to comply. Thus, speakers may feel compelled to adhere to them and, in doing so, self-censor constitutionally protected speech. Even in the absence of a direct ban, the Supreme Court has found First Amendment “chilling effects” where the government claimed that cooperation with a speech restriction was voluntary.⁵ According to the Supreme Court, when determining whether speech has been “chilled,” the concern is not so much what government officials will actually do, but whether reasonable commercial entities are likely to censor themselves to avoid official pressure and regulation.⁶ Thus, a constitutional violation can arise from the mere threat of sanctions.⁷

In sum, the proposed nutrition principles amount to a government-imposed limitation on protected speech notwithstanding their proposed status as guidelines for “voluntary” behavior. The Working Group would be better served by focusing on truly voluntary industry-led efforts and educational initiatives,⁸ rather than suppressing protected speech in this indirect manner.

⁴ See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 896 (2010) (“The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated”).

⁵ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69 (1963). In *Bantam*, the Court rejected the government’s argument that cooperation with a state commission was voluntary and that book distributor plaintiff was “free” to ignore the commission’s notices, in the sense that his refusal to “cooperate” would have violated no law. The Court observed that officials’ behavior, which included issuing veiled threats of court action and other methods of intimidation (e.g., follow up visits by police officers) convinced plaintiffs to discontinue providing certain books; “[p]eople do not lightly disregard public officers’ thinly veiled threats. . . .” *Id.* at 67.

⁶ See *id.* at 68 (courts must “look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of [speech] to warrant First Amendment scrutiny”); see also *id.* at 68-69 (“It would be naive to credit the State’s assertion that . . . blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation”). Moreover, courts have taken note of the chilling effect of “[s]ub silentio pressures and ‘raised eyebrow’ regulation of program content.” See *Cnty.-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1104 (D.C. Cir. 1978).

⁷ In *World Wide Street Preachers Fellowship v. Town of Columbia*, the court stated that the “threat of sanctions may deter [the exercise of First Amendment rights] almost as potently as the actual application of sanctions.” 245 F. Appx 336, 342-43 (5th Cir. 2007) (quoting *NAACP v. Button*, 371 U.S. 415 (1963)) (street preachers were threatened with arrest if they did not stop demonstration).

⁸ Media companies have actively participated in efforts to educate the public and promote healthy habits, particularly among youth. For example, Warner Bros. participated in First Lady Michelle Obama’s Let’s Move! initiative by partnering with the Ad Council and the Department of Health and Human Services to create a series of public service announcements featuring the *Looney Tunes* characters, designed to address childhood obesity in the United States.

B. The Proposed Principles Would Restrict a Substantial Amount of Protected Speech in Violation of the First Amendment.

Commercial speech benefits from strong First Amendment protection, and the Supreme Court has been vigilant in maintaining this protection.⁹ As explained in more detail below, guidelines restricting the marketing of certain types of food and beverages to children (1) do not directly advance a substantial government interest, and (2) are more extensive than necessary to serve that interest.¹⁰

1. Food Marketing Restrictions Will Not Directly Advance a Substantial Government Interest.

The law is well settled that “even where the protection of children is the object, the constitutional limits on governmental action apply.”¹¹ As such, for a restriction of this nature to pass constitutional muster, the government must show a direct causal link between food marketing and childhood obesity.¹² By its own admission, the Working Group cannot show such a link. The *Request for Comment* states that “[t]he Working Group is unaware of studies concluding whether or not such marketing is any more successful in affecting adolescents’ food choices than traditional advertising.”¹³ Whereas the Working Group’s goal is to “address[] the

⁹ See *Central Hudson Gas v. Public Service Comm’n*, 447 U.S. 557, 566 n.9 (1980) (“We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy”); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (“The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good”); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (if broad categories of speech were restricted, “the protection afforded commercial speech would be reduced to almost nothing”). See also *Childhood Obesity, Advertising and the First Amendment, A White Paper*, Martin H. Redish, Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law (June 8, 2011) (submitted with comments filed in this proceeding by the Alliance for American Advertising).

¹⁰ See *Central Hudson*, 447 U.S. at 557 (providing that commercial speech that (1) promotes a lawful transaction and is not misleading may not be restricted unless the government can show that its regulation (2) serves a substantial government interest, (3) directly advances the governmental interest asserted, and (4) is no more extensive than necessary to serve that interest. The food and beverage marketing under review here quite clearly constitutes truthful speech about lawful products. Even conceding that childhood obesity is a matter of substantial governmental concern, the proposed marketing restrictions do not directly advance the government’s interest and are far more extensive than necessary. Thus, the proposed guidelines cannot meet the *Central Hudson* test for restrictions on commercial speech. They likewise would be unable to survive a more rigid strict scrutiny analysis.

¹¹ *Brown v. Entertainment Merchants Assn.*, 2011 LEXIS 4892 (June 27, 2011) (“*Brown*”), at 32. In *Brown*, the Supreme Court struck down a California statute that restricted the sale of violent video games to minors and specifically declined to create a “wholly new category of content-based regulation that is permissible only for speech directed at children.” *Id.* at 13.

¹² See *Brown* at 23; see also *Central Hudson*, 447 U.S. at 569 (rejecting as “tenuous” and “highly speculative” the purported link between a prospective advertising restriction and the government’s asserted interest).

¹³ *Request for Comment* at 17. Research including the 2005 Institute of Medicine study on this topic indicates that among older age groups, scientific evidence suggesting a relationship between marketing and food

high rates of childhood obesity,¹⁴ research shows that obesity is a complicated societal problem that involves many factors, including rising numbers of poor children, unhealthy diets, and lack of exercise from an increasingly sedentary lifestyle.¹⁵ Thus, restrictions on food marketing are unlikely to solve the problem and cannot be found to advance a government interest in reducing childhood obesity.

2. The Proposed Restrictions are More Extensive Than Necessary to Promote the Government's Interest.

The breadth of marketing techniques included in the proposed definition of "food marketing" is astounding.¹⁶ Such an expansive definition, even used in conjunction with the objective and subjective criteria proposed to determine what is "targeted to children," would restrict a significant amount of protected speech intended to reach an adult audience.¹⁷ This burden on commercial speech is even more disconcerting, because commercial entities are urged to suppress communications that are completely truthful and involve legal activities. In particular, MPAA is concerned about the impact that such a broad definition will have on the motion picture and television industry.

choices is even more tenuous than with children, raising additional concerns about the inclusion of children 12-18 under the guidelines.

¹⁴ *Id.* at 1.

¹⁵ *See, e.g.*, Todd J. Zywicki, Debra Holt & Maureen K. Ohlhausen, *Obesity and Advertising Policy*, 12 GEO.MASON L. REV. 979, 982 (2004) ("While it is clear that the rise in obesity is the result of a change in the net calorie balance, it is not clear to what extent increased consumption and decreased energy expenditure have respectively contributed to the change"); *see also* Gary Becker, *Advertising and Obesity of Children*, available at <http://www.becker-posner-blog.com/2005/12/advertising-and-obesity-of-children-becker.html> (discussing studies attributing obesity increase to "the lower effective price of fat due to the development of efficient fast food outlets that save on time, and for teenagers a more sedentary use of leisure time due to the growth in time spent with computers, browsing the internet, and playing video games"); Richard Posner, *Advertising and Child/Teen Obesity—Posner's Comment*, available at <http://www.becker-posner-blog.com/2005/12/advertising-and-childteen-obesity--posners-comment.html> (noting "the increasingly sedentary character of activity in both work and the home, as a result of the shift from manufacturing to services and the growth of labor-saving devices in both the workplace and the home," a trend that "has affected children and teenagers because of the growing substitution of sedentary leisure activities for athletics").

¹⁶ *Request for Comment* at 18. The proposal is to use existing definitions that were developed by the FTC in connection with its 2006 study and 2008 Report to Congress. The Working Group even recognizes that the proposed definitions are "substantially broader in age range and in scope than those currently used by industry members in connection with existing self-regulatory programs governing foods marketed to children." *Id.* Such an expansive approach is out of sync with voluntary initiatives undertaken by industry leaders that are supporting the Administration's anti-obesity campaign.

¹⁷ *See* "Interagency Working Group's Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts: Constitutional Issues," by Kathleen Sullivan, Stanley Morrison Professor of Law and Former Dean, Stanford Law School; Partner, Quinn, Emanuel Urquhart & Sullivan ("Sullivan Constitutional Analysis"), at p. 19 (attachment A to comments submitted by Viacom Corp.).

The proposed definition of marketing to children would impact the motion picture and television industry in a variety of ways. The definition ó which was created for an entirely different purpose ó includes, among other things, advertising, product placement, cross promotions, and various types of consumer-product licensing (including character licensing and toy co-branding), as well as celebrity endorsements. For studios, the impact on jobs and lost revenue or other forms of in-kind payments, such as marketing promotions, would be significant.

MPAA is also very concerned about damage the principles would cause to the artistic and creative process of film production. Not surprisingly, script writers, directors, and producers often set the scene or define a character by incorporating commercial products used in daily life, including food and beverage products. For example, if the proposed principles were in place when the Academy award winning film òE.T.ö was made, the iconic scene where E.T. slowly opens a clenched fist filled with Reese's Pieces likely would have been altered.

We are also troubled by the proposal's focus on evolving social media, such as the Internet, digital, word-of-mouth, and viral marketing. Including word-of-mouth and viral marketing raises concern, because non-commercial speech between private individuals could be swept within the definition, and because in the present day environment almost all forms of marketing include aspects that alert consumers to social media offerings.¹⁸ Adding these additional categories is unnecessary, because the FTC already has taken steps to address any general disclosure concerns related to word-of-mouth or viral marketing.¹⁹

These specific concerns illustrate the sweeping impact of the proposed guidelines, which is disproportionate to the interest the government intends to promote. Alternative means exist to promote childhood health and wellness, such as funding for better school lunches, advocating increased physical fitness, and educating parents about diet and exercise, among others. Further, while there is no demonstrated link between food and beverage marketing and childhood obesity, there are meaningful self-regulatory initiatives already in place that have led to voluntary restrictions in marketing to children, and significant reformulations of specific food and beverage products.²⁰ All of these mechanisms are more tailored in nature, and carry little risk of chilling commercial speech. The Working Group should, therefore, direct its focus away from marketing restrictions and towards these less intrusive measures in its report to Congress.

¹⁸ This would effectively expand the proposed scope of the guidelines as applied to teens, which the Working Group suggests may be appropriate to focus on social media rather than traditional media.

¹⁹ The Federal Trade Commission Guides Concerning the Use of Endorsements and Testimonials (FTC Guides) were revised in 2009 to reflect the advent of blogging and other social media. *See* 16 C.F.R. § 255.0, *et seq.* The primary purpose behind the FTC Guides is to provide consumers transparency about the relationship between an endorser of a product or service and the advertiser or maker of the product or service. Self regulatory guides, such as those promulgated by the Word of Mouth Marketing Association, also supplement the FTC Guides. *See Social Media Marketing Disclosure Guide*, Word of Mouth Marketing Association (Feb. 2010), available at <http://womma.org/ethics/disclosure/Social-Media-Marketing-Disclosure.pdf>.

²⁰ *See, e.g.*, Children's Food and Beverage Advertising Initiative, www.bbb.org/us/children-food-beverage-advertising-initiative.

C. The Proposed Principles Use Inappropriate Audience Composition Methodologies.

As discussed above, the Working Group proposes to use a variety of objective measures (e.g., audience share for measured media) and subjective criteria in order to determine whether a particular marketing technique is targeted to children and adolescents. These metrics are vastly over-inclusive, and thus, could never be considered tailored to the interest at hand for constitutional purposes.²¹ Below we detail additional practical concerns with use of these criteria.

The use of audience share as a metric of whether the 30 percent threshold for children ages 2-11 or the 20 percent threshold for adolescents ages 12-17 is infeasible for motion pictures. As a practical matter, marketing decisions are implemented prior to theatrical release, and there is no historical data on audiences for unique films. Furthermore, both percentage thresholds proposed in the draft guidelines are so low they would capture many films for which the vast majority of viewers are adults.

Additionally, the Working Group's proposed principles include the use of ratings under industry codes, such as MPAA movie ratings, to determine whether a film is "child-directed."²² But MPAA ratings were developed for a very different purpose and should not be used to identify the target audience for purposes of food marketing restrictions. The MPAA ratings system traces its roots back to 1922 when films were simply approved or disapproved based on whether they were deemed "moral" or "immoral." It has evolved into an independent ratings body, which provides information to parents to aid them in determining the suitability of individual motion pictures for viewing by their children. Ratings are assigned by a board of parents who consider factors such as whether the film contains violence, sex, language, drug use and other adult activities.

While the ratings system does assign a rating of NC-17 to some films that are targeted to an adult audience and inappropriate for children, the converse is not true; that is, the ratings system does not identify films "targeted" to children. Even though a film receives a "G" rating (i.e., it lacks adult material such as violence or sex), the content might be intended for adults. Certainly autobiographies and documentaries appeal primarily to an adult audience. For example, the film "Melissa Etheridge: Live and Alone" is a concert film that captures her performing over a dozen of her biggest hits. It received an MPAA rating of "G" for General Audience, but is not likely to be the chosen fare for children and adolescents. Even some more mainstream films with "G" ratings contain content that would not appeal to children. "Babettes Feast" is about a French refugee who arrives in an isolated village in 19th century Denmark and prepares the feast of a lifetime for members of a tiny church. These examples illustrate the inherent problem of using MPAA ratings to determine whether a film is "child-directed."

²¹ See Sullivan Constitutional Analysis at p. 21.

²² See *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation, A Report to Congress*, Federal Trade Commission (released July 2008), at Appendix B. Advertising in or contiguous to movies or videos rated G by the Motion Picture Association of America was considered to be child-directed, while advertising in or contiguous to those rated PG was considered to be teen-directed.

MPAA is also concerned about any attempt to determine the audience composition of evolving social media outlets. These new marketing techniques are evolving so rapidly that they are tricky to measure and define. Indeed, most of these marketing channels reach a substantial adult audience. Although the percentage of adolescents who use social media is higher than the percentage of adults who use it, because the U.S. population is overwhelmingly adult (75%),²³ the absolute number of social media users are adults by a large margin. Furthermore, the trend in social networking is toward more adult usage compared to usage by children and adolescents.²⁴

Methods for measuring online audiences are also still evolving.²⁵ Identifying child-directed outlets can be challenging, because social media measures tend to focus on quantitative analysis, such as click-through rates, unique visits, and time spent on a page.²⁶ It can also be difficult for advertisers to connect with online consumers, who can screen content via pop-up blockers, parental controls, digital recording devices, and other technologies.²⁷ These measurement difficulties suggest a substantial risk that the proposed restrictions would impact a sizeable number of adults. For all these reasons, applying the proposed food marketing principles to social media would be highly over-inclusive, and therefore inappropriate and unwise.²⁸

²³ See U.S. Census Bureau 2005-2009 American Community Survey 5-Year Estimates, available at http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2009_5YR_G00_S0101&-ds_name=ACS_2009_5YR_G00_.

²⁴ *Global Faces and Networked Places*, Nielsen Company (Mar. 2009), at 4, available at http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen_globalfaces_mar09.pdf.

²⁵ A variety of companies have formed the Coalition for Innovative Media Measurement, for example, which seeks to ensure that effective media measurement keeps pace with the rapidly changing media environment. The coalition is conducting research to identify innovative solutions for media measurement. See <http://www.cimm-us.org/about.htm>.

²⁶ See *id.*

²⁷ *Advertising Industry in the Digital Age*, Congressional Research Service, (Feb. 1, 2011), at 7 (the "CRS Report").

²⁸ See, generally, Sullivan Constitutional Analysis.

IV. Conclusion.

Congress and the Obama Administration have reached out to the public, private, and non-profit sectors to help with the campaign to fight childhood obesity. Media companies have supported these efforts in a variety of ways,²⁹ and food and beverage companies have responded by building on self-regulatory programs governing foods marketed to children. In light of continued voluntary efforts to combat obesity, the MPAA encourages the Interagency Working Group to focus its report to Congress on truly voluntary initiatives that avoid burdening protected speech.

²⁹ For instance, the National Association of Broadcasters Educational Foundation partnered with First Lady Michelle Obama's Let's Move campaign to get kids across U.S. middle schools to exercise. *See* http://www.nabef.-org/letsmove/broadcaster_resources_event.asp. Similarly, Viacom has sponsored the Let's Just Play multimedia initiative to help kids make healthy lifestyle choices and combat childhood obesity, which culminates each year with the "Worldwide Day of Play," when Nickelodeon literally "goes dark" on its children's television networks and web sites for an afternoon to encourage kids to go outside and be active.