

Jon Leibowitz, Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250

Thomas Frieden, Director
Centers for Disease Control and
Prevention
1600 Clifton Road
Atlanta, GA 30333

Margaret Hamburg, Commissioner
Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993

July 8, 2011

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

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

Dear Chairman Leibowitz, Director Frieden, Secretary Vilsack, and Commissioner Hamburg:

Thank you for this opportunity to comment on the Interagency Working Group's (IWG) Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts. We strongly support the IWG's proposed nutrition principles and marketing definitions. This is an important time to address food marketing to children and youth. Our nation faces unprecedented rates of unhealthy weights and unacceptable rates of morbidity and mortality due to preventable chronic diseases.

The Public Health Law Center promotes legal approaches to public health policy, and provides legal technical assistance to local, state, and federal public health officials and attorneys across the country. We also conduct law-related research projects to support development of effective public health laws and policies. We support and have joined the comments filed by the Food Marketing Workgroup and the National Policy and Legal Analysis Network to Prevent Childhood Obesity. We are also filing separate comments to provide additional information relating to the points described below.

We are currently conducting a research project funded by the Robert Wood Johnson Foundation's Healthy Eating Research Program to study the effectiveness of self-regulation of food marketing to children in addressing concerns about children's food marketing practices that contribute to unhealthy weights, from both legal and marketing perspectives. As part of this

research, we have been analyzing the food and beverage cases issued by the Children’s Advertising Review Unit (“CARU”), the marketing commitments made by the Children’s Food and Beverage Advertising Initiative (“the Initiative”) (including coverage of the companies’ various brand portfolios), and the interplay between these two self-regulatory programs. Our comments are based on unpublished data and preliminary findings from this research, as well as our legal and marketing expertise. We make the following recommendations and points, with the rationale in support provided below:

- **The proposed principles should recommend that a substantial majority (e.g., 75%) of the brand variants (SKUs) within a food or beverage brand meet the proposed nutritional principles before the brand is marketed to children or teens**
- **The proposed principles provide needed uniformity for what constitutes “marketing” and what should be considered “targeted” at children and teens by self-regulatory programs; there are gaps and a lack of consistency across programs on these issues**
- **In the definitions of what activities will be considered “targeted” at children and teens, the proposed principles should include a measure relating to the total number of these age groups exposed to the marketing activity, and not simply the proportion of audience they represent**
- **Additional subjective indicators should be included in the indicators for determining what is marketing “targeted” at children or teens**

A. A substantial majority (e.g., 75%) of the brand variants (SKUs) within a food or beverage brand should meet the proposed nutritional principles before the brand is marketed to children or teens.

The IWG requested comments about brand advertising and marketing in Question 2. We believe this question is relevant both as a nutritional and as a marketing question. We believe that the proposed principles should be adapted to accommodate marketing of a brand or product line, and not just specific food products or menu items within a brand.

The Initiative is the only industry-wide self-regulatory program focused exclusively on food and beverage marketing to children. It explicitly excludes point-of-sale and packaging from its definition of advertising, and implicitly excludes “pure branding.”¹

¹ Children’s Food and Beverage Advertising Initiative Program and Core Principles Statement at 2 & 3, and n. 4-5 (3d. Ed. 2010) (hereinafter “Initiative Core Principles”). Available at <http://www.bbb.org/us/storage/0/Shared%20Documents/Enhanced%20Core%20Principles%20Tbird%20Edition%20-%20Letterhead.pdf>, accessed on July 7, 2011.

The IWG correctly recognizes that brand advertising and marketing is an important and pervasive marketing strategy, particularly with children. There is a well-established body of research in marketing that demonstrates the importance of brand equity, and why it is considered to be central to a company's identity and business strategy, beginning with the CEO and extending throughout the firm.²

Branding is about building and maintaining a favorable identity and image of a product. It strives to (1) build awareness and interest in a brand, (2) develop and enhance positive attitudes about the brand, and (3) foster relationships between consumers and the brand. Brand awareness is particularly valuable to companies because research shows that familiarity with a brand leads to liking, and that consumers tend to choose familiar brands over unknown brands.³ Additionally, the underlying value of a brand name is frequently based on the specific positive associations linked to it.⁴ For example, features such as the Playplace, the happymeal.com website, Happy Meal toys, Ronald McDonald and the McDonald's logo can each help to create a positive feeling or attitude that becomes linked to the McDonald's brand and its specific product offerings.

Finally, brands can play a significant role in driving both the purchasing decision and user experience (this is referred to as the "brand driver" role).⁵ For example, it is very likely that the "Lunchables" brand name drives consumer purchasers of Lunchable products, as opposed to any specific SKU within the Lunchables line.

Scholarly research in marketing also shows that brand equity is an important consideration in child-targeted marketing. Brand preferences are formed in early childhood.⁶ Children recognize brands by ages 3-4. By age 7-8, children can name multiple brands in many product categories, mention brand names as key type of product information, and often make requests by brand name.⁷ Between ages 8-13, children's connections between their self-identities and brands develop both in number and sophistication.⁸

² See, e.g., DAVID A. AAKER, BUILDING STRONG BRANDS (1996); DAVID A. AAKER AND ERICH JOACHIMSTHALER, BRAND LEADERSHIP (2000); and KEVIN LANE KELLER, STRATEGIC BRAND MANAGEMENT (3rd ed. 2008).

³ For a discussion of this phenomenon, see for example, MAX SUTHERLAND, ADVERTISING AND THE MIND OF THE CONSUMER – WHAT WORKS, WHAT DOESN'T AND WHY (3rd ed. 2008).

⁴ See, e.g., DAVID A. AAKER, MANAGING BRAND EQUITY (1993).

⁵ DAVID A. AAKER AND ERICH JOACHIMSTHALER, BRAND LEADERSHIP (2000).

⁶ Kenneth D. Bahn, *How and When Do Brand Preferences First Form? A Cognitive Developmental Investigation*, 13 J. CONSUMER RES. 382 (Dec. 1986).

⁷ Deborah Roedder John, *Consumer Socialization of Children: A Retrospective Look at Twenty-five Years of Research*, 26 J. CONSUMER RES. 183 (Dec. 1999).

⁸ Lan Nguyen Chaplin and Deborah Roedder John, *The Development of Self-Brand Connections in Children and Adolescents*, 32 J. CONSUMER RES. 119 (June 2005).

By excluding pure branding from its definition of covered marketing activities, the Initiative fails to address a significant marketing activity that is reaching many children and is likely to influence their brand preferences and choices. Moreover, because any given brand portfolio likely includes products with a range of nutritional profiles, brand marketing creates confusion for parents and children about which products are supposed to be “better for you.”

We have studied the Initiative companies’ product portfolios in detail, examining those brands where at least one brand variant (SKU) was eligible to be marketed to children, according to each company’s Initiative pledge. Our preliminary data shows that there is significant variation in the proportion of options within a brand that are eligible to be marketed to children under the Initiative. The range is from about 20% to 100%. In simpler terms, this means that although a child may see an advertisement for a specific brand variant or SKU, as many as 80% of the options actually available at the store (the point-of-sale) are for similarly branded items that do not meet the firm’s pledge requirements. Our study thus indicates that for many brands, there is still significant room for improvement; and for some brands, a *majority* of the items within a set of branded offerings do not meet a company’s own nutritional criteria for eligibility to be marketed to children. The potential for confusion at the point-of-sale is clear, and may be exacerbated in the future as consumers come to rely on child targeted advertising as a signal that the product being promoted is nutritionally sound.

We are not alone in our concern about branding efforts targeted at children that may still occur under the terms of the Initiative. In its recommendations to the international community, International Obesity Task Force (IOTF) and Consumers International (CI) have recommended that there should be no marketing to children of energy-dense, nutrient poor foods *and brands associated with these foods*.⁹

Thus, we urge the IWG to address these branding issues with the proposed nutritional principles.

Below, we address several points relevant to marketing definitions in general, and to Questions 24, 26 and 27.

B. A uniform standard for what constitutes “marketing” and “targeted” to children and teens is needed to address the lack of consistency across self-regulatory programs.

We support the IWG’s definition of marketing targeted to children and teens, and the inclusion of the categories of marketing and promotional techniques relied on by the Federal Trade Commission (FTC) for its 2006 and 2009 marketing expenditure studies (as set forth in FTC,

⁹ International Obesity Task Force and Consumers International, *Recommendations for an International Code on Marketing Foods and Non-Alcoholic Beverages to Children* (March 2008) (hereinafter, “IOTF Report”).

Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation: A Report to Congress (July 2008) and *Appendices* thereto). We agree that a uniform understanding of the kinds of activities that constitute marketing targeted to children and youth is necessary and helpful, and would help to promote consistency among the self-regulatory programs operating in the U.S.

The Director of the Initiative (as well as many industry groups) has criticized the IWG's proposed definitions as being overly broad and overreaching.¹⁰ While it is certainly true that the Initiative's definition of "advertising" is much narrower than the marketing definitions proposed by the IWG, we note that this definition is also significantly narrower than the one applied by its sister programs at the National Council of Better Business Bureaus--the National Advertising Division and CARU. As explained above, the Initiative explicitly excludes point-of-sale, packaging, and implicitly excludes "pure branding" from its definition of advertising. In contrast, CARU and NAD both define "advertising" to include packaging and other point-of-sale promotions, and appear to cover brand advertising as well.

NAD and CARU monitor "national advertising," which they define as:

any paid commercial message, in any medium (*including labeling*), if: (a) it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; (b) it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and (c) the content is controlled by the advertiser.¹¹
(Emphasis added.)

CARU has explicitly stated that packaging is covered by this definition, and has issued over a dozen cases relating to concerns about packaging during the past seven years.¹² CARU has also expressed concerns about other forms of point-of-sale advertising.¹³

¹⁰ Transcript of Proceedings at 81-82, Food Marketed to Children, Forum on Interagency Working Group Proposal, May 24, 2011 (testimony of Elaine Kolish).

¹¹ CARU, Self-Regulatory Program for Children's Advertising, §II.B.1 (9th Ed. 2009) (hereinafter, CARU Guidelines). Available at <http://www.caru.org/guidelines/guidelines.pdf>, accessed on July 7, 2011. NAD uses the identical definition. National Advertising Review Council, *The Advertising Industry's Process for Voluntary Self-Regulation, Procedures for The National Advertising Division, The Children's Advertising Review Unit, and the National Advertising Review Board* § 1.1 .A (March 8, 2010). Available at http://www.nadreview.org/2010_Procedures.pdf, accessed on July 7, 2011.

¹² See, e.g., Unilever United States, Inc., Case No. 4237 (CARU Oct. 18, 2004) (involving Popsicles); Kraft Foods, Case No. 4336 (CARU May 26, 2005) (involving various fruit snack products); Kellogg Co., Case No. 4515 (CARU June 7, 2006) (involving Pop Tarts); Del Monte Corp., Case No. 5114 (CARU Dec. 3, 2009) (involving Fruit Chillers); and Kellogg Co., Case No. 5165 (CARU April 23, 2010) (involving Pop Tarts). Copies on file with author.

The Initiative's exclusion of packaging and other point-of-sale promotions is a significant weakness of that program for several reasons. Studies show that point-of-sale marketing is effective in influencing purchasing decisions, so that consumers are engaging in high levels of in-store decision-making.¹⁴ Thus, unsurprisingly, spending on in-store shopper marketing is increasing, relative to traditional marketing. The trend in marketing is that 60-75% of marketing expenditures are being spent on packaged goods.¹⁵ These expenditures include point-of-sale displays, feature advertising, signage, and trade incentives. Additionally, packaging has become increasingly important as a communications channel and as a tool to create brand impressions. Importantly, packaging also has been shown to impact children's food choices and preferences.¹⁶

Additionally, the Initiative has not been consistent with CARU in terms of defining the meaning of "primarily directed" at children. In mid-2006, CARU stated, in the context of an expedited case involving advertising for a juice product that aired during children's programming, that it "considers programming with a 35% audience composition of [children ages 2-11], airing before 9:00 pm, to be children's programming."¹⁷ Yet, when the Initiative launched in November 2006, it provided no specific standard regarding how "advertising primarily directed to children under 12" should be defined by participating companies, allowing each to set their own standards for audience composition levels and the like in various forms of media. It was not until fall of 2010 (in the third rendition of the pledge framework) that the Initiative announced that companies had generally standardized their definitions around the 35% threshold.¹⁸

As these gaps and inconsistencies demonstrate, there is a clear need for more standardization across self-regulatory programs.

¹³ Chic-Fil-A, Inc., Case No. 4843 (CARU May 5, 2008) (tabletop advertisements for breakfast items). Copy on file with author.

¹⁴ Grocery Manufacturers Association (GMA), Booz & Co. and SheSpeaks, *Shopper Marketing 3.0: Unleashing the Next Wave of Value* (March 2008).

¹⁵ GEORGE E. BELCH AND MICHAEL A. BELCH, *ADVERTISING AND PROMOTION* (9th ed. 2012).

¹⁶ See, e.g., Matthew A. LaPierre et. al., *Influence of Licensed Spokescharacters and Health Cues on Children's Ratings of Cereal Taste*, 165 ARCH. PEDIATR. ADOLESC. MED. 229 (March 2010); Christina A. Roberto et. al., *Influence of Licensed Characters on Children's Taste and Snack Preferences*, 126 PEDIATRICS 88 (July 2010); and Ike-Elechi Ogba et. al., *How Packaging Affects the Product Preferences of Children and the Buyer Behaviour of their Parents in the Food Industry*, 11 YOUNG CONSUMERS 77 (Jan. 2010).

¹⁷ NAD/CARU Case Reports, vol. 36, No. 5 (May/June 2006), at 433 (CARU Activity Report).

¹⁸ Initiative Core Principles, *supra* n.1, at 1.

C. We support the IWG’s proposed audience composition thresholds for defining what marketing would be considered “targeted” to children or teens, and also recommend the inclusion of a measure based on total numbers.

This comment is relevant to Question 26. We also support the lower thresholds that the IWG proposes for audience shares in measured media (for children ages 2-11 years, the audience share measured on an annual basis that is considered “targeted” to children would be 30%, while for adolescents ages 12-17 years, the relevant audience share would be 20%; for the Internet where viewer composition is measured, the rate would be 20% for both age groups). These thresholds will reach a more accurate number of children and teens than do current self-regulatory standards.

However, we believe that definitions based on audience composition percentages are limited in effectiveness, if the goal is to include marketing strategies that actually reach children at significant rates. As a 2007 FTC study noted, approximately 50% of television food commercials seen by children in 2004 were not actually shown during children’s programming;¹⁹ much exposure occurs when children are less than 20% of the viewing audience.²⁰

Thus, we believe a more meaningful approach would be to move beyond proportion to total number of children exposed to the marketing activity. For example, the World Health Organization (WHO) and the International Obesity Task Force (IOTF) provide helpful models. The WHO’s Report entitled „Marketing Food and Non-Alcoholic Beverages to Children’ defines “promotion to children” as including both promotions “deliberately targeted to children and scheduled to reach them *and promotion[s] that [are] targeted at other groups but to which children are widely exposed.*”²¹ (Emphasis added.) The IOTF recommends that for broadcast media, definitions of child-targeted marketing should be based on “*both the absolute number of children likely to be watching or listening and the number of children as a proportion of overall audience.*”²²

¹⁹ Debra J. Holt et al., *Children’s Exposure to TV Advertising in 1977 and 2004: Information for the Obesity Debate* (June 1, 2007) (Federal Trade Commission, Bureau of Economics Staff Report).

²⁰ Debra M. Desrochers and Debra J. Holt, *Children’s Exposure to Television Advertising: Implications for Childhood Obesity*, 26 J. PUB. POL’Y & MARKETING 182 (Fall 2007).

²¹ World Health Organization, *Marketing of Food and Non-Alcoholic Beverages to Children: Report of a WHO Forum and Technical Meeting* (2006), at 1. See also, World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children* (2010).

²² IOTF Report, *supra* n. 9, at 8.

We recommend the IWG include a measure for total number of children and teens exposed, in addition to using audience composition standards, to determine what marketing activities are “targeted” at these age groups.

D. The IWG’s reliance on both objective and subjective indicators for determining what is marketing “targeted” at children or teens is consistent with current self-regulatory programs; we recommend additional subjective indicators based on IOTF recommendations.

This comment is relevant to Questions 24 and 27.

We also strongly support the IWG’s proposal to use the set of subjective indicators relied upon by the FTC to define whether marketing activities are child- or teen-directed. This is consistent with approaches taken both by CARU and the Initiative. For example, CARU determines whether “national advertising” is “primarily directed to children under 12” based on factors such as its assessment of whether the media content in which the marketing material appears is intended for children under 12, as reflected in the content’s subject matter and format.²³ CARU also assesses the subject matter and format of the marketing material itself in determining whether it was intended for children under 12.²⁴ For example, in a case (where it ultimately found that the commercial was not directed at children), CARU noted that because the commercial was for cookies and used child actors, it would “undoubtedly have strong appeal to child viewers.”²⁵

The Initiative program similarly incorporates both objective and subjective criteria in defining “primarily directed to children,” including subjective criteria such as “the overall impression of the advertising.”²⁶

In addition to the subjective indicators relied up on by the FTC, we recommend that the following subjective factors also be taken into account, based on the 2008 IOTF recommendations:

- **colors and images (in addition to language) designed to particularly appeal to children or teens should be considered**
- **shape or novelty of food or packaging should be considered as part of definition of what constitutes a child or teen-oriented “theme” or “product”**

²³ CARU Guidelines, *supra* n. 11, at §II.A.1.

²⁴ *Id.*

²⁵ Associated Biscuits of America, Case No. 1515 (CARU, Mar. 15, 1979) (Peak Freens cookies).

²⁶ Initiative Core Principles, *supra* n.1, at §II.B.1.

We appreciate this opportunity to comment, and share our observations and research with the IWG. We strongly support the IWG in this important work. We would be pleased to provide any further information that might be useful.

Sincerely,

Julie Ralston Aoki
Staff Attorney
Public Health Law Center
William Mitchell College of Law
651.290.7506
Julie.RalstonAoki@wmitchell.edu

Elizabeth S. Moore, Ph.D.
Project Consultant and Co-Principal
Associate Professor
Department of Marketing
University of Notre Dame
574.631.6263
emoore@nd.edu