



July 8, 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: Proposed
Nutrition Principles: FTC Project No. P094513

Dear Sir or Madam:

This comment is being submitted on behalf of Leo Burnett Company, Inc. (“LBC”) in response to the solicitation by the Interagency Working Group (“IWG”) for public comments on the Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts (the “Principles”). LBC shares the IWG’s stated goal of reducing the incidence of childhood obesity; however, we are concerned that the proposal in the area of food marketing to children is inappropriate and possibly misguided toward meeting that goal. The proposals will detrimentally impact commercial speech and the ability to use intellectual capital. The IWG proposal will also potentially frustrate existing robust and serious industry self regulation, which has not been given a reasonable and fair opportunity to develop and succeed.

CARU and CFBAI Self-Regulation vs. IWG “Voluntary” Principles

LBC has been and continues to be a committed proponent of self-regulation in the area of advertising and marketing, including self regulation regarding the marketing of products to children. LBC has long been an active proponent and supporter of the industry’s well-recognized National Advertising Review Council self regulatory programs administered through the Council of Better Business Bureaus.

In 2006, dozens of industry leaders gathered to address issues surrounding food marketing. The result of those meeting was the creation of the Children's Food and Beverage Advertising Initiative ("CFBAI"), administered through the Council of Better Business Bureaus. Only in its fourth full year of existence, the CFBAI has evolved and expanded each year since its inception. The CFBAI over time also has significantly enhanced the program's requirements, and as a direct result of the voluntary efforts of the manufacturers supporting CFBAI, the nutritional profile of many foods shown in child-directed advertising has been reformulated to meet the CFBAI voluntary commitments. Thus, today, many foods advertised to children are lower in calories, fats, sugars and sodium and contain more positive nutrients than just a few years ago.

We share FTC Chairman Leibowitz's belief that self-regulation with encouragement from government is the recipe for success in this area.¹ The advertising industry heeded the FTC's call that even if marketing to children was not "the problem," it should be part of "the solution."² Through use of its regulatory position and by engaging in industry "check ups,"³ the FTC has encouraged the food and beverage industry to reformulate foods and has also encouraged companies to join the program. The FTC's call for a broader scope of coverage has resulted in an evolution within the CFBAI. Whereas, originally the industry members' voluntary marketing commitments extended to measured

¹ See Concurring Statement of Commissioner Jon Leibowitz, Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation (July 29, 2008), www.ftc.gov/speeches/leibowitz/080729foodmarketingtochildren.pdf ("In many ways, industry self-regulation with encouragement from government is really a middle ground approach – somewhere between the government-mandated advertising restrictions adopted in some foreign nations (which might be subject to First Amendment challenge in this country) and the *laissez-faire* approach once urged by many in the business community. Indeed, especially here, a little government involvement – combined with a lot of private sector commitment – can go a long way toward the healthier future for our children that all of us want to see").

² See Childhood Obesity and the Obligations of Food Marketers or Whether or Not You Are Part of the Problem, You Need to Be Part of the Solution, Remarks of Commissioner Jon Leibowitz at the FTC– HHS Forum on Childhood Obesity "Weighing In: A Check-Up on Marketing, Self-Regulation & Childhood Obesity" (July 18, 2007).

³ See <http://www.ftc.gov/opa/2008/07/foodmktng.shtm>. A full list of the companies that received 6(b) requests can be found here: http://www.ftc.gov/os/6b_orders/foodmktg6b/index.shtm. Those companies received another 6(b) request in 2010 and the FTC's report based on those findings is expected soon.

media, now the basic voluntary CFBAI pledge extends to a broader reach of media coverage including child-directed interactive games, DVDs of G-rated movies, mobile media, as well as word of mouth advertising.⁴

In addition to the CFBAI, please also recognize the important and ongoing work of the Children's Advertising Review Unit ("CARU"), which is the industry's self-regulatory program for all advertising directed to children. CARU's jurisdiction reaches even beyond that of CFBAI. The CFBAI commitments are supplemental to the CARU self-regulatory standards.

CARU specifically revised its Self-Regulatory Program for Children's advertising (the "Program")⁵ in 2006 to enhance its self regulatory guidelines regarding food advertising to children. As a result, CARU now provides comprehensive self-regulatory oversight including limitations on the depictions of food in advertising directed to children. Among the key CARU guidelines imposed on 100% of food marketers in all media with regard to food marketing targeted to children 2-11 years of age are the following:

- *The amount of product featured should not be excessive or more than would be reasonable to acquire, use or consume by a person in the situation depicted. For example, if an advertisement depicts food being consumed by a person in the advertisement, or suggests that the food will be consumed, the quantity of food shown should not exceed the labeled serving size on the Nutrition Facts panel; where no such serving size is applicable, the quantity of food shown should not exceed a single serving size that would be appropriate for consumption by a person of the age depicted.*
- *Advertising of food products should encourage responsible use of the product with a view toward healthy development of the child. For example, advertising of food products should not discourage or disparage healthy lifestyle choices or the consumption of fruits or vegetables, or other foods recommended for increased consumption by current USDA Dietary Guidelines for Americans and My Pyramid, as applicable to children under 12.*

⁴ The Children's Food & Beverage Advertising Initiative in Action: A Report on Compliance and Implementation During 2009 (2010)

⁵ See <http://www.caru.org/guidelines/index.aspx>.

- *Advertisements for food products should clearly depict or describe the appropriate role of the product within the framework of the eating occasion depicted.*
 - *Advertisements representing a mealtime should depict the food product within the framework of a nutritionally balanced meal. While there may be a number of acceptable ways to depict a nutritionally balanced meal for children, each depiction should contain at least three of the five major food groups, preferably including those food groups recommended for increased consumption by current USDA Dietary Guidelines for Americans and My Pyramid (i.e., fruits, vegetables, fat-free or low-fat milk and milk products and whole grains). The food included in the meal should reflect reasonable portion sizes and types of foods appropriate for children in the meal setting depicted. For example, a reasonable depiction of carrots may contain an appropriate side-dish portion for a child, rather than one or two condiment-size sticks. If the meal includes a caloric beverage, the beverage should be one that is appropriate in a nutritionally balanced meal taking into account the beverage's nutritional attributes and its calories within the context of the meal depicted.*
 - *Snack foods should be clearly depicted as such, and not as substitutes for meals.⁶*

Moreover, CARU standards are not empty, aspirational principles. The CARU guidelines are enforced by well-trained, independent, and dedicated attorneys and advertising specialists who interface with large and small advertisers, including food companies, on a regular basis. The CARU staff considers cases brought forward by consumers, academics, competitors, and the government. As a result of CARU enforcement, CARU will either secure commitments from those advertisers to discontinue advertising that is considered to be in violation of CARU guidelines or refer the advertiser's practices to the appropriate regulatory agency for review. A quick review of CARU cases, even just within the last 18 months, reveals active, functioning self regulation in the area of food marketing, some cases involving companies that are not CFBAI members. Compliance with CARU determinations is virtually universal. Were an advertiser not to honor a

⁶ *Id.*, Section II(b).

CARU decision against its advertising, CARU refers the matter to the FTC.⁷ Thus, the advertising community has an established, well-functioning self-regulatory program in place, complete with enforcement procedures. We question the creation of an entirely separate set of “voluntary” principles, which supplant the need for industry to have its self-regulatory programs at all. Robust self-regulation in the advertising area is one of the attributes that sets the U.S. apart from many countries. As the FTC has long recognized and espouses today under its current leadership, self-regulation *encouraged* by government is the proper balance between a vibrant free market economy with commercial speech rights and a plethora of consumer choices on the one hand and a sense of shared responsibility in the face of national concerns about health and nutrition on the other hand. It would be a waste for the government to destroy self regulation instead of enabling it to thrive and succeed.

“Voluntary” Principles? Or Regulation in Disguise?

The Principles are not “encouragement”; rather they are an expression of governmental regulatory intent that may in fact destroy the efforts of the food and beverage industry to promulgate effective self-regulation. The proposals are as “voluntary” as going to your boss’ home when she invites you to dinner. Were the Principles truly simple “encouragement,” IWG may have stopped with the statements “the Working Group encourages the food and beverage industry to create a measured, reasonable self-regulatory process that will help ensure children are educated about healthy nutrition choices.” Of course, the Principles go much further than this.

The Principles as written would not be enforceable had they been proposed as “law.” As discussed below, there is no scientific basis for a belief that the Principles would have a “significant impact” on obesity in the U.S. Because of this, the Principles are unlikely to withstand constitutional scrutiny under a commercial speech analysis. Perhaps, recognizing this, the agencies that make up the IWG may possibly have designed the voluntary approach to avoid judicial review by captioning the regulations as “voluntary” guidelines instead of actual regulations. However, there is little that is voluntary in the principles as

⁷ See, e.g., Haribo of America, Inc., *Gold-Bear Gummy Candy*, CARU Reports, #5255C (May 2011) (candy manufacturer disagreed with CARU’s findings and upon advertiser’s refusal to comply CARU referred the matter to the FTC).

proposed. If promulgated, the Principles will serve as evidence (or a sort of “dicta”) of the mindset of the government.

Thus, LBC respectfully submits that promulgation of “voluntary principles” of this type is an abandonment of the Commission’s commitment to self-regulation and a problematic circumvention of the ordinary regulatory channels. Such “voluntary” regulation is possibly not likely to pass constitutional muster as a matter of due process and may well be inconsistent with the Administrative Procedures Act.

Failure to Present Scientific Basis

The IWG has failed to present any evidence that food marketing is responsible for the rise in obesity. We question if any evidence exists to support the commercial speech restrictions being imposed at all. In fact the American Association of Pediatrics recently published a policy statement that essentially rehashes research from as many as six years ago, yet the report actually underscores the dearth of research supporting a commercial speech restriction in this arena. Despite the AAP’s call for a ban on “junk food” or “fast food” advertising, the AAP’s report contains no direct evidence that advertising or marketing of food products is a contributing factor in causing obesity.⁸

The Principles Will Not Withstand Constitutional Scrutiny

To the extent that the Principles will result in restrictions to commercial speech,⁹ they would fail constitutional review since there is no scientific basis to prove that the restriction advances the government’s interest. According to the standards set forth by the Supreme Court in Central Hudson Gas & Elec. Corp. v. Pub. Utilities

⁸ The AAP policy statement is full of direct research about how watching television and living a sedentary lifestyle contributes to obesity and yet there is not one recommendation that there be any legislative effort to mandate physical education or any other policy that would increase activity. Every one of the recommendations is focused on prohibiting advertising or asking for money to research how advertising and media cause obesity.

⁹ LBC recognizes that this assumption may be more limited than the actual impact of the Principles. As other comments suggest, the Principles could operate as a restriction on both expressive speech *and* commercial speech. However, LBC’s interests are more focused on the impact of the Principles on commercial speech, and so this comment will be drafted accordingly. Please understand that this comment should not be interpreted as suggesting that LBC does not also find the potential restriction on expressive speech overly restrictive and problematic.

Comm'n,¹⁰ there is a four-step analysis for determining if commercial speech restrictions violate the First Amendment: The speech at issue must concern a lawful activity and not be misleading. If the activity is (1) lawful and the speech not misleading, then (2) the government must assert a substantial interest. The government must (3) show that the regulation being proposed directly advances that interest. Finally, (4) the regulation cannot be more restrictive than necessary to advance that interest.¹¹

Here, (1) the marketing of food and beverage products is a legal activity, and the Principles are not focused on regulating misleading speech (which would already be regulated by the bounds of Section 5 of the FTC Act). (2) The IWP's stated interest is the reduction of childhood obesity, which is clearly a substantial government interest and a goal that LBC supports. However, the Principles will fail a constitutional challenge because the (3) IWG cannot show that the Principles would directly advance this interest and (4) because the impact of the Principles will be significantly more restrictive than is necessary to advance that interest. The recent decision in *Brown v. Entertainment Merchants Association* underscores that without a "causal link" between the "actual problem" in need of solving and the curtailment of free speech that is actually necessary to the solution, the proposed restriction will fail to pass Constitutional muster.¹²

The Principles' Overbroad Reach

The proposed advertising ban is also much too broad in its assessment of what constitutes "marketing to children." Among the activities that would be banned are sponsorships of charities that benefit children; portrayals of athletes or celebrities that are "highly popular" with children; use of words like "child" or "kid" on food packages; depictions of characters on packaging, including well-established trademarked characters; and advertising on programs where as few as

¹⁰ 447 U.S. 557 (1980)

¹¹ It is noteworthy that the Supreme Court, in the context of an analysis of video game advertising focusing on expressive speech, noted that "a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed ... solely to protect the young from the ideas or images that a legislative body thinks unsuitable for them." *Brown v. Entertainment Merchants Association*, No. 08-1448, slip op. at 7 (U.S. June 27, 2011).

¹² *Id.* at 12.

20% of the viewing audience are kids (or even on 100% adult-audience programs that fall within the same part of the broadcast day where child oriented programs appear). These are all incredibly sweeping definitions with a reach that infringes upon speech directed toward, and received by, adults.

Consider, for example, that the Principles would be a *de facto* ban on advertising food products that are authorized by the FDA to make health claims or that are recommended by the USDA. Was it really the intent of the IWG to ban this all such advertising marketed to children? Yet that would be the impact of the proposed Principles. Simply put, the Principles are too broad as currently drafted and would be too restrictive on speech, whether that speech is expressive or commercial.

The IWG Proposal's reach into the 12-17 year old range is unprecedented. The concern regarding marketing to children less than 12 years of age is well-established and marketers carefully take into account the age of the audience and the CARU and self imposed marketing and advertising guidelines designed to address the concerns.¹³ However, treating adolescents from an advertising perspective would wreak havoc. Given today's media marketing mix, the overlap in programming and content between teens and adults becomes confusingly blurry. It will be very difficult if not impossible to distinguish between a teenaged market segment and an adult market segment. Defining "children" as being under twelve makes sense in light of the long-standing recognition that children in that age range are not equipped to process complex information, particularly when couched in persuasive advertising. Treating teens and adults like one would treat a six year old does not make sense, and it is not a fair balance between the competing interests of free commercial speech and the industry's role in voluntarily limiting that speech in connection with food advertising. The impact upon the media and publishing may be significant in light of the advertising dollars which may be lost as advertisers work to avoid any media in connection with which 20% of the potential audience may be in their teens. Given the state of the media economy, such an economic hit may be overwhelming.

¹³ See Self-Regulatory Program for Advertising to Children, Section I(C)(1) ("Advertisers have special responsibilities when advertising to children or collecting data from children online. They should take into account the limited knowledge, experience, sophistication and maturity of the audience to which the message is directed. They should recognize that younger children have a limited capacity to evaluate the credibility of information, may not understand the persuasive intent of advertising, and may not even understand that they are being subject to advertising").

The Principles also ask that packaging designed with characters that may potentially be appealing to children not be used. Barring the use of equity characters, created over years and possessing significant goodwill, diminishes not only the value of those characters and trademarks, but also may force the advertisers to abandon trademarks from being used on certain packaging altogether. The costs associated with this include not only the repackaging costs, but also the costs of re-establishing lost brand equity. Such costs would not be a purposeful investment toward the goal of reducing obesity but would simply and significantly damage the ability to market, establish, and differentiate brands. The result may prevent trademark owners from protecting and even maintaining their valuable intellectual property. While we do not believe that IWG is intending to injure industry in this way, the Principles' breadth appears to be an attack on branding as a whole, which will not only create a dangerous precedent for commercial free speech and impose significant collateral damage to brand value generally but also will do nothing to alleviate childhood obesity concerns that the IWG was charged to address.

Finally, the breadth of the IWG Principles threatens traditional fundraising activities that involve food products, including even Girl Scouts cookie sales. It would also severely limit large and small companies' participation in campaigns to raise funds for programs like Little League and high school athletic teams, as well as for national charities like United Way, which raises funds for both children and adult organizations. At a time when charitable organizations need more help not less, the IWG's proposals may not be welcomed with open arms once their implications are broadly understood.

For these reasons, LBC respectfully submits that the IWG Principles, although well-intended, are misguided, over-reaching, and inappropriate. The food and beverage industry and the marketing industry are all working together with the National Advertising Review Council, the Council of Better Business Bureaus (both of whom to date have been guided by the FTC's encouragement) to improve the nutritional value of products that are marketed to children across all media. The IWG Principles would essentially prohibit many marketing practices that are targeted at a diverse and primarily adult demographic. Finally, we are seriously concerned that the IWG Principles are not supported by any scientific basis that

provides the necessary significant link between advertising and obesity, thus making enforcement of the “voluntary” principles contrary to the Constitutional protections for commercial speech.

Respectfully submitted,

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