



July 14, 2011

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580.

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

Dear Sir or Madam:

The National Frozen Pizza Institute ("NFPI") is pleased to submit these comments to the Federal Trade Commission ("FTC" or "Commission") in response to the "Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts" ("the Proposal") issued by the Interagency Working Group on Food Marketed to Children ("IWG").¹

The National Frozen Pizza Institute (NFPI) is the national organization dedicated to advancing the interests of the frozen pizza industry. NFPI members include processors of frozen pizza and pizza products, as well as companies that supply products or services used in the production and marketing of frozen pizza and pizza products. NFPI monitors federal regulatory and legislative activities that impact the frozen pizza industry and promotes the frozen pizza category to consumers and the retail trade. For the reasons discussed below, NFPI respectfully requests the IWG withdraw the current Proposal. In its current form, it represents mandatory regulations that are overbroad, vague, inconsistent with current Federal standards, and have no demonstrated benefit.

A. The Proposal is Mandatory

NFPI agrees with the IWG that the use of voluntary guidelines enabling industry self-regulation is preferable to mandatory regulations. That said, we respectfully submit that the Proposal is, in reality, a set of mandatory requirements. Failure to follow the Proposal, if adopted, would not be illegal per se. However, each agency has the authorities necessary to take action against what it perceives as a company's failure to follow the Proposal.

¹ Available at: <http://ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.

For example, we understand that a FTC official commented that not following the principles could be considered a deceptive practice. The FTC can take action against a company for deceptive practices. Likewise, the U.S. Department of Agriculture (USDA) pre-approves all labels for meat and poultry products. Failure to obtain prior approval means the label cannot be used, a prohibition enforced by the USDA inspector present in every plant, every day. USDA can deny approval (and has done so) based on guidelines and informal policies.

Since this Proposal has the force and effect of law when incorporated into the agencies' existing regulatory structure, it must either be issued as a proposed rule (with the appropriate cost-benefit analysis) or modified.

B. The Proposal is Overbroad

The Proposal goes beyond what is traditionally considered as marketing and extends to labeling. Under the Federal Food Drug and Cosmetic Act and the Federal Meat and Poultry Inspection Acts, labeling of food includes both the package itself and any other material "accompanying" the product, such as point of purchase material. See *Kordel v. United States*, 335 U.S. 345 (1948); FSIS Labeling Policy Memorandum 114A. Labeling of food generally is regulated by the Food and Drug Administration; meat and poultry labeling by USDA; labeling is not regulated by the FTC. See *Kordel*, supra (Congress did not intend "to eliminate" labeling from FDA jurisdiction "even though every labeling is, in a sense, an advertisement.")

However, all comments on "marketing," including comments on labeling, are to be submitted to and considered by the FTC, presumably because the FTC drafted Part III of the Proposal. Given the expertise for food labeling lies elsewhere (FDA and USDA), we respectfully suggest that labeling (including point of purchase materials) be withdrawn entirely from the definition of "marketing," at least until this portion of the Proposal has been considered by the labeling officials at the agencies with primary jurisdiction.

The IWG should also be mindful of unintended negative consequences. If "marketing to children" includes sponsoring sport events, such as little league teams, there would be less opportunity for such events if food companies withdrew support to avoid non-compliance. It seems ironic for a proposal, arguably issued to address childhood obesity, to adversely impact physical activities. In addition, the societal cost of effectively banning charitable activities for fear of running afoul of the Proposal's ban needs to be factored into any cost-benefit analysis.

C. The Proposal is Vague

The Proposal's definition of what constitutes "marketing to children" is vague when applied to specific activities. When is corporate activity "marketing" to children and when is it not?

- Starting with NFPI's own web site, on our home page, we show a picture of a child sitting down with a pizza, smiling and giving a thumbs-up sign. If that same picture was used on a company's web site, would that constitute marketing to children?
- If marketing to children includes use of children's icons, would the use of Santa Claus or other seasonal figures be covered under the definition?
- If marketing to teens includes social media, the assumption is that such a medium is only used by teens. Even if that were true when the FTC did its study in 2006, those same teens are now adults. How will it be possible to draw any clear lines within this technologically savvy generation?

- How can a company assess whether a long standing brand icon, used with several generations of consumers, has suddenly become “marketing” to children.

The above are a few examples of the difficulty the IWG and companies will face in determining whether any specific activity constitutes “marketing to children.” This difficulty is compounded for products such as pizza. Pizza is a product that is enjoyed by people of all ages.

Given the proposed guidelines will become *de facto* mandatory and enforceable, albeit indirectly, vagueness is a fatal flaw.

D. Inconsistent with Federal Nutrition Standards

The nutrient principles are not aligned with existing federal food and nutrition programs or guidance and lack evidence-based support that such standards would have any significant effect on maintaining a healthy body weight or preventing obesity among children ages 2 – 17 years. The IWG’s principles are not consistent with the Dietary Guidelines because they apply to children of all ages, whereas the Dietary Guidelines set specific recommendations for sub-populations (ages 1–3, 4–8, 9–13, and 14–18). The proposed sodium restrictions do not align with the Dietary Guidelines because they establish a single, restrictive limit on sodium consumption for all age groups, which is not scientifically supported. The Dietary Guidelines, in contrast, set different sodium recommendations by age group.

The Dietary Guidelines focus on the overall composition of the diet, with less consideration given to the individual foods that may be consumed. The Dietary Guidelines’ recommendations encompass two overarching concepts: (1) maintenance of calorie balance over time to achieve and sustain a healthy weight; and (2) consumption of nutrient-dense foods and beverages. By focusing on specific foods and imposing detailed nutrient requirements, the IWG’s proposed principles do not consider the diet holistically, as recommended by the Dietary Guidelines.

IWG’s proposed principles fail to align with other important components of federal nutrition policy, including the National School Lunch program. Considered as a whole, the IWG’s proposed principles are inconsistent with established federal nutrition policy and would prevent the marketing of foods long-recognized as nutritious and healthy to children and adolescents. It is essential for the government to establish consistent federal nutrition standards because conflicting federal guidance will cause confusion among all stakeholders.

E. Data Does Not Consider Recent Progress Made

The IWG properly recognized the substantial progress made voluntarily by the food industry; however, the data employed by the IWG in developing the Proposal is dated. Substantial progress has been made by the industry in reducing advertisements that clearly were directed at children. In the case of frozen and refrigerated pizza, such advertisements were reduced by 95% between 2004 and 2010. Generally, the Children’s Food and Beverage Advertising Initiative has resulted in both healthier foods and less advertising since its formation in 2005.

In the 2009 Omnibus Appropriations Act (H.R. 1105), Congress charged the IWG to conduct a study. NFPI respectfully submits that use of the FTC’s 2008 report does not comport with this Congressional charge. If Congress wanted the older study used, it would not have requested a study be conducted. We respectfully submit that the IWG needs to conduct a new study, based on the current state of marketing, and not use data that existed before the charge was given by Congress.

Conclusion

NFPI supports an industry-initiated, voluntary approach to address marketing of food to children. Industry's voluntary efforts have made and will continue to make substantial progress. The defects in the Proposal make it likely to be counter-productive, exposing companies to liability for activities without any corresponding benefit. Therefore, NFPI would recommend that the IWG withdraw this proposal and carry out the study required by Congress.

We appreciate the opportunity to comment and look forward to working with the members of the IWG to build on the progress already made by the industry to limit marketing to children of nutrient-poor products and further develop a strategy that will truly address our nation's obesity crisis.

Respectfully submitted,


Lucas Darnell
National Frozen Pizza Institute