



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

Dear Sir or Madam,

The National Association of Theatre Owners (“NATO”) submits these comments in response to the preliminary proposal issued by the Interagency Working Group on Food Marketed to Children<sup>1</sup> (“IWG”) for voluntary principles to guide industry self-regulatory efforts to improve the nutritional profile of foods marketed to children.

NATO is the largest motion picture exhibition trade organization in the world, representing more than 30,000 movie screens in all 50 states, and additional cinemas in 50 countries worldwide. Our membership includes the largest cinema chains in the world and hundreds of independent theater owners. NATO has commented frequently on behalf of its members on issues with a commonality that affects the exhibition industry. We believe the guidelines impact our industry in the following ways: the advertising we show on screen prior to the movies, the presence of branded products inside the movies (over which we have no control) and the advertisements at the concession stand.

In an effort to address the increasing rates of childhood obesity in the United States, the 2009 Omnibus Appropriations Act<sup>2</sup> contained a provision that established the IWG to conduct a study and subsequently develop recommendations for standards for the marketing of food to children who are 17 years old or younger. Instead of completing a thorough and objective study as

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<sup>1</sup> The IWG is comprised of representatives from the Federal Trade Commission, Food and Drug Administration, Centers for Disease Control and Prevention, and the U.S. Department of Agriculture.

<sup>2</sup> H.R. 1105.

mandated by Congress, however, the IWG simply skipped that burdensome step and issued overbroad, highly restrictive food marketing principles<sup>3</sup> that would suppress advertising to those 17 years old and younger across every marketing platform, ranging from television, to product placements in movies, to social media like Facebook, to cell phones, and even schools. Indeed, the IWG appears to use these guidelines not only to circumscribe legitimate, truthful marketing and advertising, but to dictate the content of the food itself, which it otherwise is not empowered to do. Recent U.S. Supreme Court (“Court”) decisions strongly suggest that the IWG's proposal is unconstitutional.

The IWG inquires whether the voluntary principles would raise First Amendment concerns if Congress were to enact them into law. While the Court has ruled that although the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression, nevertheless the First Amendment protects commercial speech from unwarranted governmental regulation as long as it is lawful and not misleading.<sup>4</sup> This and two very recent decisions, discussed below, would compel the Court to strike down any attempt by Congress or a federal agency to codify these guidelines for violating freedom of speech.

Most recently, the Court moved to significantly limit government regulation of commercial speech as long as it is truthful by rejecting regulations aimed at diminishing advertising. In *Sorrell v. IMS Health Inc.*<sup>5</sup>, the Court held that it is a necessary cost of freedom for Americans to endure speech they do not like, since they are free to dismiss advertising and marketing. In that case, the Court held, “Fear that speech might persuade provides no lawful basis for quieting it. . . . [T]he State may not burden the speech of others in order to tilt public debate in a preferred direction.” And in *Brown v. Entertainment Merchants Association*<sup>6</sup>, the Court protected the first amendment rights of minors to receive information that may otherwise be considered offensive. Taken together, these decisions make clear that the guidelines are unenforceable.

Obesity is a complex problem with no simple solution, but commonsense and science tells us that government intervention of this kind does not make people healthier. The IWG provides a dearth of evidence—such as a cost-benefit analysis or empirical data—that these overbroad proposals would result in the reduction of obesity rates among youths in the United States. Furthermore, the IWG fails to recognize the significant voluntary, self-regulating initiatives aimed at children to encourage healthier dietary choices and lifestyles undertaken by the nation’s

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<sup>3</sup> In a House Energy and Commerce Subcommittee on Oversight and Investigations hearing on July 7, 2011, Rep. Marsha Blackburn noted that food in USDA’s WIC program would not meet the IWG’s proposed principles. In the same hearing, FTC Chairman Jon Leibowitz acknowledged that he would be “pretty happy” if his children ate Special K cereal with yogurt for breakfast—which he conceded would not meet the proposed IWG guidelines. This is an example of “do as we say, not as we do” at its most basic.

<sup>4</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561.

<sup>5</sup> No. 10-779.

<sup>6</sup> No. 08-1448.

food and beverage industries.<sup>7</sup> At the same time, cinema operators are exploring low-calorie alternatives to their regular concession menu items in response to moviegoers showing interest in healthier options.

While the IWG asserts that the proposed principles are voluntary and do not call for regulation of food marketing, it is evident that the federal government is drawing a line in the sand and applying pressure on the food and beverage industries without going through the legislative or regulatory process. Although the proposed guidelines lack the power of regulation, companies that do not comply could risk myriad consequences, including federal agency enforcement actions, implementation of stricter regulations, frivolous class action lawsuits and irreparable damage to their public image. Simply put, when the federal government says something is “voluntary”, it’s akin to a Corleone making an offer you can’t refuse.

If adopted, the IWG’s voluntary guidelines would have a significant impact on the types of foods that could be marketed to children and teenagers. Under the overly restrictive guidelines, an overwhelming majority of the foods and beverages currently marketed to children would not meet the proposed nutrition principles.<sup>8</sup> Although there is no evidence these voluntary principles would have a positive effect in reducing childhood obesity, the overly restrictive limitations on ingredients—such as sugar and sodium<sup>9</sup>—would require multi-billions of dollars in substantial reformulation<sup>10</sup> of nearly every food and beverage product advertized or marketed toward children at a significant cost to manufacturers that likely would be passed on in part to consumers during a time of economic difficulty for most Americans. So, perhaps the guidelines will meet their intended goal, but not in the way the IWG intended. Children will lose weight not because they are being marketed healthier foods, but because increased prices will force parents to purchase less food.

While the goals of the federal government to reduce obesity are certainly laudable, coercing companies that are taking proactive steps in addressing the country’s obesity crisis into meeting

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<sup>7</sup> See, e.g., the Children's Food and Beverage Advertising Initiative. The Council of Better Business Bureaus and 10 leading food and beverage companies launched the CFBAI in November 2006. The goal of the Initiative was to shift the mix of advertising primarily directed to children to encourage healthier dietary choices and healthy lifestyles. As of 2010, the number of participants had grown to 17. Meaningful nutrition standards now govern what foods participants advertise to children, and five participants no longer advertise soft drinks or candy to children.

<sup>8</sup> See LA Times, *Food, Advertising Industries Call Voluntary Guidelines Unreasonable*. “Only 12 of the 100 most consumed foods in the U.S. would meet the FTC's criteria,” said Dan Jaffe, executive vice president of the Association of National Advertisers.

<sup>9</sup> The IWG recommends a reduction in sodium in food marketed to children to no more than 210 mg per serving by 2021. A recent study by the American Journal of Hypertension found that even a 50 percent salt reduction could not be associated with a significant decrease in cardiovascular disease or mortality risk.

<sup>10</sup> While you can reformulate food or beverage products, you sure can’t make consumers purchase them. For example, many cinema operators responded to a 1994 study by the Center for Science in the Public Interest on the nutritional content of movie theater concession items, by offering their patrons additional choices, such as air-popped popcorn. After very little time, movie patrons made their voices heard—they wanted the traditional popcorn back.

the IWG's overly stringent food marketing principles is not well targeted and threatens to derail the search for effective solutions. The IWG guidelines reflect a continued growth in the federal government's paternalistic attitude that the public in general and parents in particular lack the necessary intelligence to distinguish between healthy and unhealthy foods. We urge the federal government to work with, not against, the food and beverage industries to find a better way to combat childhood obesity.

Respectfully submitted,

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