



To: Federal Trade Commission, Office of the Secretary

From: Baylen J. Linnekin, Executive Director, Keep Food Legal

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

Date: July 14, 2011

I am writing to submit the comments of Keep Food Legal (<http://www.keepfoodlegal.org/>), a grassroots nonprofit based in Washington, DC, on behalf of our members and supporters. Keep Food Legal is the first and only nationwide, nonprofit membership organization devoted to culinary freedom—the right of every American to grow, raise, produce, buy, sell, cook, and eat the foods of their own choosing. Keep Food Legal members and supporters hail from across the United States and are key cogs in nearly every link in the food chain: farmers, ranchers, fishermen, hunters, manufacturers, grocers, restaurateurs, tavern owners, chefs, consumers, foodies, activists, academics, and authors.

I am the founder and executive director of Keep Food Legal. I am a lawyer, earned an advanced degree in agricultural and food law, and have written extensively on food regulation, law, and policy. I have also worked as an attorney reviewing food labels—including some likely to be marketed to children—for compliance with FDA regulations. I have recently been interviewed by print, radio, and television media seeking my opinions on the proposed guidelines at issue in FTC Project No. P094513.

Keep Food Legal, on behalf of our members and supporters, opposes the proposed advertising guidelines for two overarching reasons. First, the recommended guidelines are unnecessary and will likely be ineffective. Second, the recommended guidelines are constitutionally defective, as they run afoul of the First Amendment.

First, with regard to the necessity and likely efficacy of the proposed federal guidelines, Keep Food Legal opposes these federal guidelines because they completely ignore the central role played by parents and guardians in making family food decisions. Just how far off base and ignorant of reality is the very basis of these guidelines is evident in the fact the words “parent,” “supervision,” and “purchase” do not appear anywhere in the nearly 30-page request for comments on the *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts*.

Implying a causal connection between viewing a marketing message and consuming a particular food is tenuous in nearly any instance. Doing so when the eater in question happens to be a young child is particularly absurd. Children of five or ten years old do not make purchase or consumption decisions pertaining to food any more than they make such decisions about family vacations, automobile purchases, cable and Internet subscriptions, or clothing. Children do not work—most are prohibited by law from doing so—and so do not earn or spend money. Their only influence over a parent or guardian who purchases food is to ask for, suggest, or plead for certain purchases. While a child's requests no doubt include foods marketed directly to that child, the ultimate responsibility for making food purchases rests—as it should—with that child's parent or guardian. It is up to a parent or guardian—not the state, in the form of the Interagency Working Group—to make informed and sensible food purchases for his or her family. This is as it should be.

Second, with regard to the severe First Amendment deficiencies evident in the so-called “voluntary guidelines,” Keep Food Legal opposes such federal guidelines largely because they fail to meet the requisite constitutional burden. As Northwestern University professor and esteemed First Amendment scholar Martin H. Redish writes in his recent white paper *Childhood Obesity, Advertising and the First Amendment*, the Interagency Working Group's guidelines evince “all of the constitutional pathologies sought to be prevented by the First Amendment's protection of commercial speech.”

Any restriction on commercial speech must pass *each* of the three prongs of the Supreme Court's *Central Hudson* test in order for the Court to uphold the restriction. Here, the proposed guidelines fail *not just one* of the prongs of the *Central Hudson* test, *they fail both the second and third prongs*.

While the government's stated “goal of improving children's diets and addressing the high rates of childhood obesity” represents a substantial government interest under the first prong of the *Central Hudson* test, the guideline does not materially advance the government's asserted interest (the second *Central Hudson* prong). Nor is the guideline narrowly tailored to serve that interest (the third *Central Hudson* prong).

Here, as I noted earlier, the guidelines cannot materially advance the government's interest in improving children's diets where the only consumers capable of making purchasing decisions—parents and guardians—are not the ones targeted by the restriction on commercial speech. Thus, the guidelines fail the second *Central Hudson* prong. Furthermore, because the guidelines would ensnare commercial speech intended both for children and adults, and impact both so-called junk food and healthy foods like yogurt and cereal, the guidelines are overbroad. For these reasons, the guidelines fail the third *Central Hudson* prong.

In conclusion, Keep Food Legal and our members and supporters oppose the proposed advertising guidelines because they are unnecessary and will likely be ineffective, on the one hand, and because they do not meet the high burden set by the Supreme Court's *Central Hudson* test, on the other. Thank you for reviewing and considering the comments of Keep Food Legal.